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Supreme Court of the United States

October Term, 1975

No. 75-1337

BARBARA GUTMACHER GIRARD,

Petitioner,

against

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Respondents.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Barbara Gutmacher Girard, prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Second Circuit entered in the office of the clerk on January 13, 1976, in which the Second Circuit by a vote of two to one sustained District Judge Robert J. Ward's summary dismissal of petitioner's civil rights complaint in which she charges that the defendants, Lawrence Wilkinson, John H. Stookey and Thomas E. Murray, arbitrarily and destructively conspired to deprive her of her $300,000 coopera-

tive apartment solely because she is a woman, in violation of sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985 (3) (1970).

Opinions Below

The opinion of District Judge Robert J. Ward is reported, 396 F. Supp. 450 (S.D.N.Y. 1975). It is reproduced as Appendix I, *infra*, pp. A1-A12. The opinions of the United States Court of Appeals for the Second Circuit are not yet reported. They are reproduced as Appendix II, *infra*, that of Circuit Judge Thomas J. Meskill in which Circuit Judge Sterry R. Waterman joined, at pp. A13-A25, and that of dissenting Circuit Judge James L. Oakes, pp. A26-A32.

Jurisdiction

The Second Circuit rendered its judgment affirming the judgment of the United States District Court for the Southern District of New York and entered its order of affirmance on January 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the conspiracy of the defendants, Lawrence Wilkinson, John H. Stookey and Thomas E. Murray, to deprive Barbara Gutmacher Girard of her $300,000 cooperative apartment solely because she is a woman, violate sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985 (3) (1970)?

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2. Do the decisions of the state courts of New York in giving effect to this conspiracy constitute state action under *Shelley* v. *Kraemer*, 334 U.S. 1 (1948)?

3. Do the provisions of the Fourteenth Amendment through the conspiracy provisions of the Civil Rights Act of 1871, 42 U.S.C. §1985 (3) (1970), provide a cause of action against the defendants under *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971)?

4. Do the conspiring defendants, by their arbitrary conduct in attempting to throw Barbara Gutmacher Girard out of her marital home without any opportunity for a hearing or a statement of any reasons, violate our concept of due process embodied in the Fifth and Fourteenth Amendments?

Constitutional and Statutory Provisions Involved

1. Fifth Amendment

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Fourteenth Amendment, Sections 1 and 5

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *

SECTION 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. Civil Rights Act of 1871, §1, 42 U.S.C. §1983 (1970)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Civil Rights Act of 1871, §2, 42 U.S.C. §1985 (3) (1970)

If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

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Statement of the Case

The petitioner, Barbara Gutmacher Girard, brought her action in the United States District Court for the Southern District of New York under 28 U.S.C. §§1343 (1), (3) and (4), and 1331 (a), charging the defendants, Lawrence Wilkinson, John H. Stookey and Thomas E. Murray with conspiring to deprive her of her $300,000 cooperative apartment solely because she is a woman in violation of sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985 (3) (1970).

Judge Ward, treating the motion of the defendants under Rule 12 (b) (6), Fed. R. Civ. P., to dismiss as a motion for summary judgment, granted it. The Second Circuit, by a vote of two to one, Circuit Judge James L. Oakes dissenting, affirmed.

On July 20, 1963 Barbara Gutmacher Girard, the daughter of Rose and Martin Gutmacher, married Stephen S. Girard. One child, Nicole, was born of this union on July 25, 1966 (34A, 44A).*

The Girards purchased 497 shares of the capital stock of the corporate defendant and by reason of this purchase became the owners of the proprietary lease to the fourth floor of the building at 1125 Fifth Avenue, New York, New York. The stock was taken in the name of Stephen S. Girard (13A-33A). On January 10, 1968 the Girards moved into this cooperative apartment (62A). This became their marital home. Barbara and her daughter Nicole, now age

* References are to pages of the Appendix in the Second Circuit, unless otherwise indicated.

9, are still there. They want to stay there. That is why we are here.

In 1973 the Girards were divorced. As part of the separation agreement between them, which was incorporated in the divorce decree, Stephen S. Girard transferred to his wife Barbara, in lieu of alimony, the 497 shares of stock in the cooperative defendant and the proprietary lease to the fourth floor at 1125 Fifth Avenue (35A-36A, 53A).

However, the defendants, Lawrence Wilkinson, John H. Stookey and Thomas E. Murray, who were directors and shareholders of the corporate defendant as well as tenants and occupants of apartments in the building owned by the corporate defendant (86A), as was the plaintiff, Barbara Gutmacher Girard, conspired to deprive her of her fourth floor $300,000 cooperative apartment. They arbitrarily refused to recognize her as the rightful owner. The complaint alleges in Paragraph 14 that "the defendants conspired with each other and formed a deliberate design in purpose to injure this plaintiff solely for the reason that she is of the female sex, and to deprive her of her civil rights by reason of her sex and of her substantial property rights in the subject premises, and, in particular, the ownership of the aforesaid shares of stock and the proprietary lease in said premises, the purpose, intent and result of which was to enable, permit and allow the said defendants to receive for their own use and benefit and not for the benefit of plaintiff the sole and exclusive right to determine who shall own said shares of stock and the proprietary lease in the subject premises, and the said defendants did the various wrongful and unlawful acts hereinafter alleged,

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all in furtherance of such unlawful design and purpose" (6A).

The complaint alleges, among other things, in Paragraph 16 (b) that in furtherance of the conspiracy the defendants "specifically refused plaintiff an opportunity to appear and be present at any discussions or meetings of the officers and Board of Directors of the corporate defendant at which she could establish her proprietary interest in said shares of stock and lease, and refused to provide plaintiff with minutes of said meetings or with any statement, written or oral, which would explain the basis of the aforesaid acts" (7A).

The plaintiff, Barbara Gutmacher Girard, was never accorded any meeting with the defendants. They would not hear her. They told her nothing. Theirs was arbitrary action at its worst and ugliest.

They would not accept her money. To do that might have meant that they recognized Barbara Gutmacher Girard as the lawful possessor of the $300,000 fourth floor cooperative apartment at 1125 Fifth Avenue; and, in the eyes of the conspiring defendants, God forbid any such result. They would accept anything rather than that. The complaint alleges in Paragraph 16 (c) that the conspiring defendants in furtherance of their conspiracy:

> "Failed and refused to accept any checks or other payments tendered by plaintiff or her agents in full payment of the maintenance required for occupancy of said demised premises, although plaintiff duly offered to pay same and has, in fact, tendered to the corporate defendant any and all payments required under the terms of the aforesaid proprietary lease, which pay-

ments were previously accepted by the corporate defendant from Stephen S. Girard and/or plaintiff" (8A).

Not only did the defendants refuse to take Barbara Gutmacher Girard's money; they also refused to accept a guarantee from her father for any monies that might be due from her. The complaint alleges in Paragraph 16 (d) that the conspiring defendants in furtherance of their conspiracy:

> "Failed and refused to accept any guarantee by any persons financially able to discharge any indebtedness that may arise to the corporate defendant by reason of plaintiff's continued occupancy of the subject premises as tenant thereof" (8A).

In addition, the conspiring defendants engaged in a deliberate and malicious campaign of annoying the plaintiff, Barbara Gutmacher Girard, with harassing telephone calls at all hours of the night and day. The complaint alleges in Paragraph 16 (f) that the conspiring defendants in furtherance of their conspiracy:

> "Deliberately and maliciously made telephone calls to plaintiff at unreasonable hours solely for the purpose of harassing and annoying her in order to force plaintiff to vacate said premises and to withdraw her demand to the corporate defendant to recognize her as the lawful owner of the aforesaid shares of stock and proprietary lease to said premises" (8A).

Here is the way Circuit Judge John L. Oakes in his dissenting opinion treated the conspiracy allegations of the complaint in the instant case:

> "But here the individual defendants were not alleged to be simply agents or employees of the cor-

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porate defendant, nor to be acting in the scope of their employment, nor to be acting for the corporate benefit. A closer reading of the complaint indicates that appellant explicitly alleges that the injurious acts of the individual defendant conspirators were indeed committed in their individual, not their corporate, capacities.

"Here the complaint alleges that the individual defendants 'constitute the officers and the entire Board of Directors of the corporate defendant, and *wholly dominate, operate and control all its business and financial affairs.*' (Emphasis added.) These allegations alone serve to distinguish this case from *Dombrowski, supra.* As recognized by Judge McMillen in *Cohen* v. *Illinois Institute of Technology*, 384 F. Supp. 202, 205 (N.D. Ill. 1974), the case is entirely different when the individual officers or directors are 'alleged to have controlled [the corporate defendant] or to have personally committed acts of discrimination. * * *' In such a case, as here, the individuals are not acting at the direction of their corporate employer or necessarily for its benefit.

"Further, the complaint alleges that the defendants, 'in furtherance of the said design and conspiracy,'

> '[a]dvised, caused, permitted and allowed the President and the Board of Directors of the corporate defendant to deny plaintiff permission and authority to continue occupancy of the subject premises.'

"Surely the implication of such an allegation is not that the defendants in their capacity as corporate agents advised themselves to act in their capacity as corporate agents. Rather, it is that defendants in their individual capacities determined according to personal motives that they would cause managerial action by the president and the board of directors to serve their

individual interests. The crux of this allegation is that defendants acted, albeit behind the screen of their corporate roles, in an individual and not an official capacity.

"Here, indeed, the complaint also alleges that 'the purpose, intent and result' of the conspiracy 'was to enable, permit and allow the said defendants to receive for their own use and benefit and not for the benefit of plaintiff the sole and exclusive right to determine who shall own said shares of stock and the proprietary lease in the subject premises. * * *' (Emphasis added.) As shareholders in the cooperative corporation and as leaseholders in the building it would be to their individual financial benefit to have the Girard apartment revert to the corporation and it might very well be to their personal benefit to acquire the apartment for themselves. These allegations as to personal motives alone further serve to distinguish this case from the corporate-agent cases referred to above. *See Nelson Radio & Supply Co.* v. *Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

"Moreover, acts engaged in as a part of the conspiracy by defendants allegedly include deliberate and malicious 'telephone calls to plaintiff at unreasonable hours solely for the purpose of harassing and annoying her in order to force plaintiff to vacate said premises. * * *' Such conduct, if established, would surely be individual and non-corporate in nature; nor are these allegations to be lightly disregarded or passed off as being de minimis. *Cf. Rackin* v. *University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974)." App. II, at pp. A28-A31.

In furtherance of their conspiracy the conspiring individual defendants arbitrarily, adamantly and without reason refused to register the transfer of 497 shares of the

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Girards in the corporate defendant from Stephen S. Girard to his wife, Barbara Gutmacher Girard. Thereafter, in the words of the Second Circuit:

> "Plaintiff then initiated suit ('Action #1') in the Supreme Court of New York seeking both a declaration that the corporation's refusal was arbitrary, capricious, and unreasonable and an order compelling the corporation to transfer the stock on its books to her and to consent to an assignment of the lease. The corporation commenced its own action ('Action #2') for possession and eviction because of the unauthorized assignment and the failure to pay maintenance costs. The state court granted defendant's motion for summary judgment in Action #1, finding that the consent provision of the lease was enforceable under state law and that 'the cooperative apartment corporation had the right to refuse to consent to the transfer of the lease to plaintiff for any reason deemed satisfactory to it (except, of course, those prohibited by the Civil Rights Laws).' The Appellate Division, First Department, affirmed the order and judgment. 46 App. Div. 2d 848, 362 N.Y.S. 2d 405 (1974). Plaintiff's motion for leave to appeal to the New York Court of Appeals was denied." App. I, at p. A16.

When the state courts gave effect to the sex discrimination conspiracy of the defendants, Barbara Gutmacher Girard went to federal forum, the United States District Court for the Southern District of New York.

Reasons for Granting the Writ

I

The Second Circuit's decision refusing to give the plaintiff relief from the sex discrimination inflicted upon her, flies in the face of repeated decisions of this Court in the past half decade from *Reed* v. *Reed*, 404 U.S. 71 (1971) and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) to *Stanton* v. *Stanton*, 421 U.S. 7 (1975), *rev'g and remanding* 30 Utah 2d 315, 517 P. 2d 1010 (1974) and *Turner* v. *Dep't of Employment Security*, 44 U.S.L.W. 3298 (U.S. Nov. 17, 1975), *vacating judgment in* 531 P. 2d 870 (Utah).

In the past half decade this Court has done almost an about face in its approach to equal rights for women. The Court's earlier attitude was expressed in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873), where the Court in 1873—five years after the Fourteenth Amendment became part of the Constitution and commanded that no state shall deny the equal protection of the laws to any person within its jurisdiction—upheld a decision of the Supreme Court of Illinois that denied a woman the right to practice law. In fairness it must be said that counsel stressed the privileges and immunities provisions. Neither the bench nor the bar thought in terms of the equal protection clause.

The turning point in the Court's course came with *Reed* v. *Reed*, 404 U.S. 71 (1971), where each of the adoptive parents of a deceased minor applied for letters of administration of the decedent's estate. The Idaho Supreme Court held that under such circumstances an Idaho statutory provision gave preference to the male. The federal Supreme

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Court invalidated the provision as violative of the equal protection clause of the Fourteenth Amendment. Mr. Chief Justice Burger wrote for a unanimous Court:

> "* * * To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." *Id.* at 76-77.

The Court took a further small step forward in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), where it ruled that female members of the Armed Services were entitled to the same dependency benefits of their husbands as servicemen were entitled to receive for their wives. There was no opinion in which five members of the Court joined. Mr. Justice Brennan announced the judgment of the Court in an opinion in which Justices Douglas, White and Marshall joined. These four Justices took the position that classifications based upon sex—like those based on race, alienage and national origin—"are inherently suspect" and found "at least implicit support for such an approach in our unanimous decision only last Term in *Reed* v. *Reed*." *Id.* at 682.

Mr. Justice Brennan, after quoting from Justice Bradley's concurring opinion in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873), continued with this paragraph:

> "As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout

much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kantowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Mydral, An American Dilemma 1073 (2d ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservation of other basic civil and political rights'—until adoption on the Nineteenth Amendment half a century later." 411 U.S. at 685.

One of the Court's cases, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), *aff'g* 465 F.2d 1184 (6th Cir. 1972), *rev'g* 326 F. Supp. 1208 (N.D. Ohio 1971), and *rev'g Cohen* v. *Chesterfield County School Bd.*, 474 F.2d 395 (4th Cir.) (*en banc*), *rev'g*, 467 F. 2d 262 (4th Cir. 1972), *aff'g*, 326 F. Supp. 1159 (E.D. Va. 1971), involved three pregnant teachers, two in Cleveland, Ohio, and one in Chesterfield County, Virginia, who took school authorities to court over regulations barring them from teaching beyond certain months of pregnancy. The Court ruled in favor of the teachers, saying through Mr. Justice Stewart:

"This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. * * *

"By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." 414 U.S. at 639-40.

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In two more cases, *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Court decided that a woman had a right to an abortion in the first trimester of pregnancy, saying through Mr. Justice Blackmun in the former case:

> "To summarize and to repeat:
>
> "1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving procedure* on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164.

At its 1974-1975 term, the Court had nearly a dozen and a half cases in the equal rights between the sexes area on its docket: *Edwards* v. *Healy*, 421 U.S. 772 (1975), *vacating judgment and remanding to* 363 F. Supp. 1110 (E.D. La. 1973), "to consider whether * * * the cause has become moot," where a federal three-judge District Court in Louisiana invalidated a Louisiana constitutional provision that bans women from jury service unless they volunteer for it; *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), *rev'g* 282 So. 2d 491 (La. 1973), and *Daniel* v. *Louisiana*, 420 U.S. 31 (1975), *aff'g* 297 So. 2d 417 (La. 1974), where the Louisiana Supreme Court reached a contrary result; *Leichman* v. *Louisiana*, 420 U.S. 907, *denying cert. to* 286 So. 2d 649 (La. 1973), and *Normand* v. *Louisiana*, 420 U.S. 908 (1975), *denying cert. to* 298 So. 2d 823 (La. 1974), involving the systematic exclusion of women from grand and petit juries;

Lawson v. *Edwards*, 420 U.S. 907 (1975), *denying cert. to* 214 Va. 632, 202 S.E. 2d 869 (1974), and *Quick* v. *Harris*, 420 U.S. 907 (1975), *denying cert. to* 214 Va. 632, 202 S.E. 2d 869 (1974), where the Virginia Supreme Court held that male defendants had no standing to raise the issue of the systematic exclusion of women from trial juries; *Marshall* v. *Gavin*, 420 U.S. 907 (1975), *denying cert. sub nom. to Marshall* v. *Holmes*, 495 F. 2d 1371 (5th Cir. 1974), *aff'g without opinion*, 365 F. Supp. 613 (N.D. Fla. 1973), involving a Florida statute that allows women with children under 18 years of age to exempt themselves from jury duty; *Junior Chamber of Commerce of Rochester* v. *United States Jaycees*, 419 U.S. 1026 (1974), *denying cert. to* 495 F. 2d 883 (19th Cir.), and *Junior Chamber of Commerce of Philadelphia* v. *United States Jaycees*, 419 U.S. 1026 (1974), *denying cert. to* 495 F. 2d 883 (10th Cir.), involving the males-only membership policy of the Jaycees; *Sumpter* v. *Indiana*, 419 U.S. 811 (1974), *dismissing appeal from* 306 N.E. 2d 95 (Ind.), where the Indiana Supreme Court sustained a statute of that state which made it an offense for a woman, but not a man, to live in or frequent a house of ill fame; *Murphy* v. *Murphy*, 232 Ga. 352, 206 S.E. 2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975), involving the validity of a Georgia alimony statute; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), *rev'g sub nom. Ballard* v. *Laird*, 360 F. Supp. 643 (S.D. Cal. 1973), where a federal three-judge statutory court in California held that the statutory scheme for the discharge of Navy officers denied male officers equal protection of the laws; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), *aff'g* 367 F. Supp. 981 (D. N.J. 1973), where a federal three-judge statutory court in New Jersey ruled on equal protection grounds that a widower

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with children was entitled to the same Social Security Act survivor's benefits as a widow; *Stanton* v. *Stanton*, 421 U.S. 7 (1975), *rev'g and remanding to* 30 Utah 2d 315, 517 P. 2d 1010 (1974), involving a Utah statute under which for support purposes men became of age at 21, but women at 18; *Anderson* v. *Radcliff*, 421 U.S. 939 (1975), *denying cert. to* 509 F. 2d 1093 (10th Cir. 1974-1975), involving an Oklahoma statute allowing juvenile court benefits to females under the age of 18 while limiting such benefits to males under 16; and *Turner* v. *Dep't of Employment Security*, 44 U.S.L.W. 3298 (U.S. Nov. 17, 1975), *vacating judgment in* 531 P. 2d 870 (Utah), where the Utah Supreme Court sustained the validity of that state's statute denying unemployment compensation benefits to pregnant women during 12 weeks prior to and 6 weeks after childbirth.

In one of these cases, *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the Court, by a vote of eight to one, ruled that the changing economic and social patterns of the past dozen years make it constitutionally unacceptable for states to deny women an equal opportunity with men to serve on juries. Mr. Justice White wrote for the majority: "If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." 419 U.S. at 537.

In its latest ruling at its 1974-1975 term, *Stanton* v. *Stanton*, 421 U.S. 7 (1975), a child support case, the Court voided a Utah law setting different ages of majority for men and women. Speaking through Mr. Justice Blackmun the Court said:

> "No longer is the female destined solely for the home and the rearing of the family, and only the male

for the marketplace and the world of ideas. See *Taylor* v. *Louisiana*. * * * Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary antecedent, is apparent and a proper subject of judicial notice." 421 U.S. at 14-15.

At its 1975-1976 term, in *Turner* v. *Dep't of Employment Security*, 44 U.S.L.W. 3298 (U.S. Nov. 17, 1975), *vacating judgment in* 531 P. 2d 870 (Utah), the Court held: "We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the LaFleur case." 42 U.S.L.W. at 3299.

II

The Second Circuit's decision refusing to give relief from a private conspiracy to subject the petitioner to sex discrimination is inconsistent with this Court's decision in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) and contrary to the decisions of the Third, Fifth, Sixth and Eighth Circuits.

Section 2 of the Civil Rights Act of 1871, 42 U.S.C. §1985 (3) (1970), provides a cause of action against "two or more persons in any state or territory" if they "conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

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The United States Supreme Court in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), settled that this language applies to purely private conspiracies. That case involved some Mississippi whites who sought to block the passage of some blacks in an automobile upon the public highways. The Court held that the blacks had a cause of action against the whites, saying through Mr. Justice Stewart:

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." At 102.

Since then, four United States Courts of Appeals, the Third, Fifth, Sixth and Eighth Circuits, under varying circumstances, and various district courts have held that the conspiracy provisions of section 2 of the Civil Rights Act of 1871, 42 U.S.C. §1985 (3) (1970), apply to purely private conspiracies.

The case in the Eighth Circuit, *Action* v. *Gannon*, 450 F. 2d 1227 (1971) (en banc) (unanimous decision), involved a group of blacks who were engaged in a campaign to disrupt the religious services of a predominantly white Catholic parish. The Eighth Circuit held that the whites had a cause of action. Although the blacks had a First Amendment right of freedom of speech, the whites had a First Amendment right to freedom of worship. The Eighth Circuit held that the whites "were clearly entitled to injunctive relief because the evidence established that the defendants had disrupted religious services at the Cathedral

and that they would continue to do so unless enjoined." At 1238.

The Sixth Circuit in *Cameron* v. *Brock*, 473 F. 2d 608 (6th Cir. 1973), applied the conspiracy provisions of section 1985 (3) to opponents in a political campaign saying:

> "We hold that §1985 (3)'s protection reaches clearly defined classes, such as supporters of a political candidate. If a plaintiff can show that he was denied the protection of the law because of the class of which he was a member, he has an actionable claim under §1985 (3). This interpretation does not transform the statute into the 'general federal tort law' feared by the *Griffin* Court and gives full effect to the Congressional purpose in enacting the statute." At 610.

In the Third Circuit case, *Richardson* v. *Miller*, 446 F.2d 1247 (1971), the plaintiff alleged that the defendants, all of whom were private individuals, dismissed him from his employment because he expressed views which were critical of what he believed to be their racially discriminatory employment practices. The Third Circuit held that the complaint stated a cause of action, concluding:

> "In *Griffin*, the Court concluded that Section 1985 (3) embraced private conspiracies to deprive any person of equal protection of law or equal privileges and immunities under the law where there exists a 'racial, or perhaps otherwise class-based invidiously discriminatory animus' behind the conspirators' action. 'The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.' *Griffin, supra*, at p. 102, * * *.
>
> * * *

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"We realize that the district court did not have the benefit of the Supreme Court's opinion in *Griffin* when it filed its March 25, 1970 Order from which this appeal was taken. However, we nonetheless conclude that the *Griffin* decision provides an adequate basis upon which to conclude that plaintiff's complaint at least states a cause of action under section 1985 (3)." At 1249.

The most closely reasoned case is *Westberry* v. *Gilman Paper Co.*, 507 F. 2d 206 (5th Cir. 1975), but the court later withdrew its opinion on the ground that the case had become moot. That case involved a white environmentalist who brought suit against the defendant corporation and three individuals. The plaintiff had sought investigations of the corporate defendant for possible violation of federal pollution laws. The plaintiff alleged that the defendants conspired to take his life and his job, succeeding in the latter. The Fifth Circuit held that he had a cause of action, saying:

"This case pushes us to the frontiers of Fourteenth Amendment interpretation. We must address ourselves to a question which the Supreme Court postponed in Griffin v. Breckenridge: does the Fourteenth Amendment, through the vehicle of 42 U.S.C. §1985 (3), provide a cause of action against purely private parties?

"Today we hold that the amendment and the statute operate in tandem to provide such a cause of action. In so holding, we join a unanimous en banc decision by the Eighth Circuit and a decision by the Third Circuit.

"Constitutional viability is not a theorem, it is a fact in our volatile jurisprudence, without which the past would stultify the present and the heavy hand of

history would stunt our ethical growth and enervate our powers to meet governmental responsibilities. Here, we do not erect a new structure for a constitutional law of torts but rather enter a door which Griffin left ajar." At 207-08, 215.

Although the Fifth Circuit withdrew its opinion in this case, it came out with an even more striking decision in *McLellan* v. *Mississippi Power & Light Co.*, No. 73-3226 (5th Cir. Feb. 5, 1976). In that case the plaintiff charged a conspiracy to discharge him from his employment for violating company policy by filing a voluntary petition in bankruptcy. The court held that this conspiracy fell within section 1985 (3) saying:

> "The Supeme Court in *Griffin* concluded that the Thirteenth Amendment and the right of interstate travel authorized Congress to reach the private conspiracy alleged. Neither of those sources of Congressional power identified in *Griffin* is applicable in this case, but Congressional authority to reach the conspiracy alleged springs from article I, §8 of the Constitution:
>
> > The Congress shall have Power * * * To establish * * * uniform Laws on the Subject of Bankruptcies throughout the United States * * *
>
> Read in conjunction with the necessary and proper clause, the bankruptcy power manifestly vests Congress with the power, via civil remedies, to discourage people from conspiring to interfere with efforts of individuals to obtain discharges in bankruptcy."

Reference may also be made to a few district court opinions. *Reichardt* v. *Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975), involved an action against the California Insurance

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Commissioner and various disability insurance companies claiming that the policies offered the plaintiff and to women were sexually discriminatory. The court held:

> "Although sex has not yet been considered a 'suspect category' under federal law (*cf. Schlesinger* v. *Ballard*, 419 U.S. 498, 95 S. Ct. 572, 42 L. Ed. 2d 610 (1975); *Reed* v. *Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1975); compare Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P. 2d 529 (1971)), I hold that a private conspiracy motivated by invidiously discriminatory intent based upon a sex bias is sufficiently class-based to come within Section 1985 (3). *Cf. Griffin* v. *Breckenridge, supra.*" 396 F.Supp. at 1018.

In *Pendrell* v. *Chatham College*, 386 F. Supp. 341 (W.D. Pa. 1974), a former professor at a private college alleged, among other things, that a contract of employment with the college was not renewed because she was a woman. The court held:

> "The second particular question is whether §1985 can support a cause of action for sex discrimination, bearing in mind that, notwithstanding plaintiff's inartful pleading, a cause of action for sex discrimination against a private employer is in essence what is sought to be maintained here. Since §1985 equally draws its validity from the Fourteenth Amendment as well as the Thirteenth Amendment, and even though the Thirteenth Amendment is applicable only to discrimination against black persons and not to discrimination against women, I will hold that it will. In this instance the Thirteenth Amendment's restrictiveness is overborne by the all-inclusive effect of the Equal Protection clause of the Fourteenth Amendment." At 348.

In *Barrett* v. *United Hospital*, 376 F. Supp. 791 (S.D. N.Y. 1974), a physician brought an action against a private

hospital which had revoked his staff privileges after his indictment and subsequent plea of assault in satisfaction of a criminal abortion charge. The court followed *Griffin*, saying,

> "* * * Nevertheless, in Collins v. Hardyman, 341 U.S. 651 * * * (1951), the Supreme Court held that state action was indeed a necessary ingredient to a cause of action under these statutes. Twenty years later in Griffin v. Breckenridge, 403 U.S. 88 * * * (1971), the Court reconsidered the question and arrived at the opposite conclusion. Section 1985 (3), concluded Justice Stewart, was clearly intended to cover private conspiracies." At 806.

Accord, Mizell v. *Northbroward Hospital District,* 427 F. 2d 468, 473 (5th Cir. 1970; *Harrison* v. *Brooks,* 446 F. 2d 404 (1st Cir. 1971); *Rackin* v. *University of Pennsylvania,* 386 F. Supp. 992 (E.D. Pa. 1974); *Brown* v. *Villanova University,* 378 F. Supp. 342 (E.D. Pa. 1974); *Stern* v. *Massachusetts Indemnity & Life Insurance Co.,* 365 F. Supp. 433 (E.D. Pa. 1973); *Commonwealth* v. *Local Union No. 542,* 347 F. Supp. 268 (E.D. Pa. 1972); *cf. Weise* v. *Syracuse University,* 522 F. Supp. 2d 397 (1975); *Thomas* v. *Economic Action Committee,* 504 F. 2d 563 (5th Cir. 1974); *Phillips* v. *Trello,* 502 F. 2d 1000 (3rd Cir. 1974). *Contra, Bellamy* v. *Mason's Stores, Inc.,* 508 F. 2d 504 (4th Cir. 1974).

Circuit Judge Oakes toward the close of his dissenting opinion in the instant case has this perceptive paragraph:

> "There is, to be sure, another question, left open in *Griffin* v. *Breckinridge,* 403 U.S. 88, 102 n.9 (1971), 'whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be

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actionable' under §1985 (3). A series of recent Supreme Court cases, perhaps the foremost of which is *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), point the way toward an affirmative answer in cases involving bias on account of sex. One would estimate that deprival of valuable property rights on account of a person's gender would constitute a denial 'of the equal protection of laws' within §1985 (3), as well as within the Fourteenth Amendment. See *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973)." App. II, at p. A32.

III

The decisions of the state courts of New York giving effect to the sex discrimination conspiracy of the defendants constitute state action under *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

Historically, judicial action was considered state action at the time of the adoption of the Civil Rights Acts. Judicially, the United States Supreme Court settled the matter in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), involving restrictive covenants. There the Court held:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory divisions, it has never been suggested that

the state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." At 18.

Let us suppose that a group of whites had a section of land under restrictive covenants against blacks and then obtained a ruling from the local state court that these restrictive covenants were valid despite *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Can there be any doubt that the blacks could go into the local federal district court and obtain a ruling that *Shelley* v. *Kraemer, supra*, was the law of the land? The same results should follow where there has been discrimination against a woman, for discrimination against women is just as destructive to us as discrimination against blacks.

IV

Civil Rights Acts provide strong federal remedies supplementary to state remedies and there need be no exhaustion of either federal or state remedies in state courts before resort to federal courts.

The remedies provided by sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1985 (3) (1970), are peculiarly for enforcement in the federal courts. And it is in the federal courts that these remedies have had their greatest development, particularly in the United States Supreme Court. Especially in recent decades has the Court given effect to the real intent of the framers of the Civil Rights Acts.

Historically, these remedies were intended for the federal courts. The Court authoritatively affirmed this fact

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in *Monroe* v. *Pape*, 365 U.S. 167 (1961), and reaffirmed it two years later in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

Monroe v. *Pape*, 365 U.S. 167 (1961), involved a civil rights act suit in the federal court based on an illegal search and seizure in Illinois. The Court sustained the suit despite the fact that Illinois, by its constitution and laws, outlawed unreasonable searches and seizures. The Court, after an exhaustive study of the congressional debates, concluded:

> "The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." At 180.

After a further study of sections 1 and 2 of the Civil Right Act of 1871, the Court ruled:

> "Although the legislation was enacted because of the conditions that existed in the South at the time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." At 183.

Two years later the Court reaffirmed its holding in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), a Civil Rights Act suit based on the fact that in what was apparently an integrated school in Illinois, the blacks were put in one part of the school and the whites in another. The district court dismissed the complaint because the petitioners had not exhausted their administrative remedies under Illinois law. The Seventh Circuit affirmed, but the Supreme Court reversed, saying:

> "We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." At 671.

Accord, Wilwording v. *Swenson*, 404 U.S. 249 (1971).

Under sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985 (3) (1970), the federal courts have given not only compensatory damages but injunctive relief as well. Moreover, the courts have held that these provisions are an exception to the anti-injunction statute, 28 U.S.C. §2283 (1970). The United States Supreme Court approached this question in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), *rev'g* 318 F. Supp. 1111 (D. Conn. 1970), and settled it in *Mitchum* v. *Foster*, 407 U.S. 225 (1972).

In *Lynch* v. *Household Finance Corp.*, a three-judge federal district court in Connecticut refused to consider the constitutionality of Connecticut prejudgment and garnishment statutes "for lack of Civil Rights Act jurisdiction," 318 F. Supp. at 1114. But the Supreme Court re-

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versed and remanded the case. Mr. Justice Stewart pointed out:

> "Because of the extrajudicial nature of Connecticut garnishment, an injunction against its maintenance is not, therefore, barred by the terms of §2283. In light of this conclusion, we need not decide whether §1983 is an exception to §2283 'expressly authorized by Act of Congress.' We have explicity left that question open in other decisions. And we may put it to one side in this case because the state act that the federal court was asked to enjoin was not a proceeding 'in a State court' within the meaning of §2283." 405 U.S. at 556.

Later in the term, in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), the Court did hold that the Civil Rights Act remedies were within the exception of 28 U.S. §2283 (1970). *Mitchum* v. *Foster* involved a state obscenity proceeding. The Court, in an opinion by Mr. Justice Stewart, reasoned:

> "Section 1983 was originally §1 of the Civil Rights Act of 1871. 17 Stat. 13. It was 'modeled' on §2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the express purpose of 'enfore(ing) the Provisions of the Fourteenth Amendment.' 17 Stat. 13. The predecessor of §1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. *Monroe* v. *Pape*, 365 U.S. 167; *McNeese* v. *Board of Education*, 373 U.S. 668; *Shelley* v. *Kraemer*, 34 U.S.

> 1; *Zwickler* v. *Koota*, 389 U.S. 241, 245-249; H. Flack, The Adoption of the Fourteenth Amendment (1908); J. tenBroek, The Anti-Slavery Origins of the Fourteenth Amendment (1951). Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.
>
> * * *
>
> "It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action, * * * whether that action be executive, legislative, or *judicial*.' *Ex parte Virginia*, 100 U.S. 339, 346 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." At 238-40.

Mr. Justice Stewart then gave a review of legislative history and concluded for the Court:

> "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." At 242.

The petitioner, Barbara Gutmacher Girard, did not have to bring her Civil Rights Act claims that the defendants, Lawrence Wilkinson, John H. Stookey, and Thomas

E. Murray, discriminated against her solely because she was a woman in the state courts. Instead, she brought her claims to the appropriate federal forum, the United States District Court for the Southern District of New York.

V

The conspiring defendants, by their arbitrary conduct in attempting to throw Barbara Gutmacher Girard out of her marital home without any opportunity for a hearing or a statement of any reasons, violated our concept of due process, of fundamental fairness.

The conspiring defendants, Lawrence Wilkinson, John H. Stookey, and Thomas E. Murray, treated Barbara Gutmacher Girard with contempt. They gave her no hearing. They gave her no reason why they did not want her. Instead, they sought arbitrarily to throw her and her 9-year-old daughter, Nicole, out of the $300,000 fourth floor apartment at 1125 Fifth Avenue, in which Barbara Gutmacher Girard had been one of the original occupants and which was her marital home. Such arbitrary and unreasoned conduct violates our concept of due process, of fundamental fairness.

The concept of due process has been continuously evolving for some eight centuries. One can date this development from 1178, when Henry II appointed five judges for the whole kingdom and told them "to do right judgment." 2 *English Historical Documents* 482 (D. Douglas & G. Greenway gen. ed. 1953). Sufficient legal development followed so that a generation later, when Henry II's son John

misused his powers, the result was the Magna Charta and John was forced to promise his barons:

> "No freeman shall be taken or imprisoned or disseised or exiled, or in any way destroyed, nor will go upon him, nor send upon him, except by the lawful judgment of his peers or (per legem terrae) by the law of the land." W. McKechnie, *Magna Charta* 375 (2d ed. 1914).

In the course of time the concept "law of the land" also came to mean due process of law. King John's successors confirmed and reissued the Magna Charta, sometimes repeatedly. In 1354, Edward III (1327-1377), in addition to his frequent confirmations of the Magna Charta, further provided:

> "(N)o Man of what Estate of Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in answer (par due process de lei) by due Process of Law." 28 Edw. 3, c. 3 (1354).

Thus the phrase "due process of law" came into being.

Coke equated the two: "(B)y the law of the land (that is to speak it once for all) by the due course, and process of law." 2 *Institutes* *46. In this country, we have made the same identification. Our earlier state constitutions usually used the phrase, "by the law of the land." In *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Daniel Webster identified the law of the land provision of the New Hampshire Constitution with due process:

> "One prohibition is 'that no person shall be * * * deprived of his life, liberty, or estate, but by judgment of his peers, or the law of the land.' * * *

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"* * * Have the plaintiffs lost their franchises by 'due course and process of law?' By the law of the land is most clearly intended the general law. * * * The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." *Id.* at 561, 581 (arguments for plaintiffs in error.

Similarly, the Supreme Court equated the due process clause with the law of the land in *Murray's Lesee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), its first major decision under the due process clause of the Fifth Amendment:

"The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta.* Lord Coke in his commentary on those words, (2 Inst. 50), says they mean due process of law. The constitutions which have been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.'" *Id.* at 276.

In *Twining* v. *New Jersey*, 211 U.S. 78 (1908), the Court, through Justice Moody, explained:

"There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in * * * Magna Charta. * * *"

In a yet later case, *Hebert* v. *Louisiana*, 272 U.S. 312 (1926), the Court said:

> "What it (due process clause) does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" *Id.* at 316-17.

In the recent past, Justices Frankfurter and Harlan have given us apt statements of the due process concept. In *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), Justice Frankfurter explained:

> "Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment." *Id.* at 128.

In his concurring opinion in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), he stated:

> "'Due Process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." *Id.* at 20-21 (concurring opinion).

In *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), in a concurring opinion in which Justice Harlan joined, Justice Frankfurter added:

> "The implications of the United States Constitution for national elections and 'the concept of ordered

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> liberty' implicit in the Due Process Clause of the Fourteenth Amendment as against the States * * * were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning."

Justice Harlan thought due process to be fundamental fairness. See, *e.g., Duncan* v. *Louisiana,* 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

It is this concept which the courts have been applying to various membership organizations such as political parties, economic groups, labor unions, stock exchanges, religious organizations, Veteran's associations, and professional societies. For example, in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), the Court held that the New York Stock Exchange could not deny to two Texas over-the-counter broker-dealers direct wire connections without the notice and hearing that they requested. The Court explained in Footnote 17:

> "The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right. *Goldsmith* v. *United States Board of Tax Appeals,* 270 U.S. 117; *Russell* v. *Duke of Norfolk,* [1949] 1 All E. R. 109 (C. A.); Fellman, Constitutional Rights of Association, in The Supreme Court Review, 1961 (Kurland ed.), 74, 104, 112-113; Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1026-1037 (1963); see

authorities cited note 18, *infra; cf. Vitarelli* v. *Seaton*, 359 U.S. 535; *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 894-895; *Willner* v. *Committee on Character and Fitness, ante*, p. 96."

In an interesting state case, *Van Daele* v. *Vinci*, 51 Ill. 2d 389, 282 N.E.2d 728, *cert. denied*, 409 U.S. 1007 (1972), the Supreme Court of Illinois gave due process relief to retail grocers who had been expelled from membership in a grocery cooperative because of lack of impartiality of the cooperative's board, even though the board followed the procedure set out in the cooperative's by-laws for disciplinary hearings.

Perhaps the most discussed situation to date involved the power of the Democratic Party to exclude from its 1972 national convention certain challenged delegates from California and Illinois. The California delegates were selected in a "winner-take-all" primary. The District of Columbia Circuit in *Brown* v. *O'Brien*, 469 F.2d 563 (D.C. Cir.), *stay granted*, 409 U.S. 1 (1972), *vacated*, 409 U.S. 816 (1972), and *sub nom. Keane* v. *National Democratic Party*, 409 U.S. 816 (1972), ruled in their favor, reasoning:

> "The decision of the Party to exclude these 151 delegates who were elected in compliance with each of the party's applicable rules then in force, jeopardizes the integrity of the election process, and it therefore injures every voter in the United States and every individual and institution which is subject to the authority of the President. Because we are convinced that the process of electing the President of the United States is not, and cannot be placed outside the rule of law, we set aside the arbitrary and unconstitutional action of the Democratic Party." 469 F. 2d at 570.

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The Supreme Court first granted a stay and subsequently vacated the judgment and remanded the case for a determination whether it had become moot.

American labor unions have also found themselves subject to the expanding reach of due process, of fundamental fairness. In two cases, *NLRB* v. *Textile Workers*, 409 U.S. 213 (1972), and *Booster Lodge No. 405* v. *NLRB*, 412 U.S. 84 (1973), the Court held that unions could not fine strikebreakers who had lawfully resigned from their unions during the strike period but later returned to work.

Members of stock exchanges, involved in disciplinary proceedings, also have taken their respective exchanges to court with due process claims. In *Crimmins* v. *American Stock Exchange, Inc.*, 346 F. Supp. 1256 (S.D. N.Y. 1972), the court, although ruling against the right to counsel in that case, nevertheless said: "We think that the day is long gone when a national stock exchange can be considered a private club when it conducts disciplinary proceedings against its members or their employees."

In *Villani* v. *New York Stock Exchange, Inc.*, 348 F. Supp. 1185 (S.D. N.Y. 1972), counsel for the Exchange advised the court by letter that the Board of Governors of the Exchange approved various recommendations to change the hearing procedures and disciplinary proceedings conducted by the Exchange. In a subsequent letter, counsel reported that both the SEC and the membership of the Exchange had approved the recommendations, one of which abolished the Exchange's "no-counsel rule":

> "A person, firm or corporation shall have the right to be represented by legal or other counsel in any hearing

and review thereof held pursuant to the provisions of this Article and in any investigation before any committee, officer or employee of the Exchange authorized by the Board of Directors." *Id.* at 1189, *quoting* §23, Article XIV of the Constitution of the New York Stock Exchange.

For a fuller discussion see O. J. Rogge, *An Overview of Administrative Due Process* (pts. 1 and 2), 19 Villanova Law Review 1, 2-4, 197, 251-55 (1973).

There are two due process clauses in the federal Constitution, one in the Fifth Amendment and one in the Fourteenth Amendment. The Fifth Amendment is primarily for federal action and the Fourteenth Amendment primarily for state action. However, our concept of due process, of fundamental fairness, is more pervasive. Barbara Gutmacher Girard, who, with her husband, had the $300,000 four-floor apartment at 1125 Fifth Avenue, should not arbitrarily be thrown out without any notice, any hearing, or any statement of reasons. She is entitled to fundamental fairness, to due process, at their hands. This was her right, her due, as one of the privileges and immunities of a citizen of the United States. It was part of her due under the due process clauses of the Fifth Amendment and Fourteenth Amendments.

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Conclusion

The Court should grant this petition for a writ of certiorari and rule once again, as it has repeatedly in the recent past, that we can no more afford discriminations based on sex than those based on race.

Respectfully submitted,

O. John Rogge
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Of Counsel:
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Frederick E. M. Ballon
Howard D. Ressler

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APPENDIX I

Opinion of Ward, J.
396 F. Supp. 450 (S.D.N.Y. 1975)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 646 R.J.W.

BARBARA GIRARD,

Plaintiff,

against

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants.

Appearances

BALLON, STOLL & ITZLER, Esqs.
Attorneys for Plaintiff
KENNETH S. KNIGIN, Esq.
HOWARD D. RESSLER, Esq.
Of Counsel

SHEA GOULD CLIMENKO KRAMER & CASEY, Esqs.
Attorneys for Defendants
MARTIN I. SHELTON, Esq.
JAMES H. SCHUYLER, Esq.
Of Counsel

WARD, J.

Defendants, 94th Street and Fifth Avenue Corporation ("the corporation") and the members of its board of directors, individually, move to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment pursuant to Rule 56, Fed. R. Civ. P., on grounds of *res judicata*. Since matters outside the pleadings have been presented to and not excluded by the Court, the Rule 12(b)(6) motion will be treated as one for summary judgment.

In 1968, during their marriage, plaintiff's former husband purchased shares of capital stock of the corporation and became owner, for the term beginning January 15, 1968 and ending May 31, 1981, of the proprietary lease to the fourth floor of 1125 Fifth Avenue, New York. Thereafter, plaintiff and her husband entered into a separation agreement by which the latter assigned to plaintiff his right, title and interest in the capital stock and proprietary lease, and vacated the premises. The corporation was subsequently notified of the assignment. Plaintiff requested that she be recognized as the owner of the stock and as the lawful tenant of the premises. The board of directors, giving no reason, refused to consent to the assignment of the lease and rejected the demand by plaintiff to transfer the stock on its books to her.

Plaintiff commenced an action against the corporation in the Supreme Court of the State of New York, County of New York seeking a declaratory judgment that the corporation's refusal was arbitrary, capricious and unreason-

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able, and a court order compelling it to transfer the stock on its books to her and to consent to the assignment of the proprietary lease. The corporation moved for summary judgment, which was granted. The Court held that by the terms of the proprietary lease the corporation had the right to refuse to consent to the transfer of the lease to plaintiff for any reason it deemed satisfactory except, as the Court noted parenthetically, for reasons prohibited by civil rights laws. The Appellate Division, First Department, affirmed the order and judgment. Plaintiff's motion for leave to appeal to the Court of Appeals was denied.

Claiming that her requested ownership transfer was rejected for reasons prohibited by the Fourteenth Amendment and the civil rights laws derived therefrom, plaintiff instituted her present action in federal court. She alleges that defendants have violated 42 U.S.C. §1982,[1] by refusing to consent to the requested assignment solely because she is female. She also alleges under 42 U.S.C. §1985(3)[2] that

1. 42 U.S.C. §1983 reads:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. 42 U.S.C. §1985(3) reads:

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

(footnote continued on next page)

defendants have conspired to deprive her of her procedural due process rights by refusing to provide her an opportunity to be heard at any discussion pertaining to her interests by the board of directors of the corporation, and have conspired to deprive her of substantial property rights in the subject premises solely because she is a female. In addition, she alleges violation of the New York Human Rights Law, New York Executive Law §296(5)(a)(1) (1972).[3] Plaintiff seeks judgment directing that the cor-

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under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

3. New York Human Rights Law, New York Executive Law §296(5)(a)(1) reads:

5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin or sex of such person or persons.

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poration and the members of its board of directors recognize her as the lawful owner of the shares of stock and proprietary lease in the premises, and enjoining them from interfering with her peaceful possession of the premises.

Defendants contend that plaintiff has failed to state an adequate federal cause of action. Specifically, they argue that her §1983 claim must be dismissed for failure to set forth facts showing any deprivation under color of state law of any right, privilege or immunity and that her §1985 (3) claim must be dismissed for failure to establish a conspiracy cognizable under the statute. Alternatively, defendants contend, if plaintiff states a sufficient claim for relief on either ground, the doctrine of *res judicata* precludes their assertion here since she has already litigated this controversy in state court, where she had full opportunity to assert all claims.

28 U.S.C. §1331(a) gives this Court jurisdiction to hear the federal questions raised in plaintiff's complaint since the enforcement of rights arising under the Constitution and laws of the United States is basic to the relief she seeks and the claims she alleges are neither insubstantial nor frivolous. *Bell* v. *Hood*, 327 U.S. 678, 683 (1945); *Moore* v. *Central R. Co. of New Jersey*, 185 F.2d 369, 371 (2d Cir. 1950). Jurisdiction is not defeated by the possibility that the complaint might fail to state a cause of action. That question must be decided after, and not before, the Court assumes jurisdiction. *Bell* v. *Hood, supra* at 682; *Olson* v. *Board of Education of Union Free School District, Malverne, N.Y.*, 250 F. Supp. 1000, 1004 (E.D.N.Y. 1966).

To state a claim for relief under 42 U.S.C. §1983, a plaintiff must show (1) a deprivation of rights, privileges

or immunities secured by the Constitution and laws of the United States, and (2) causation of such deprivation by a person acting under color of state law. "In cases under §1983, 'under color of law' has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966) (citing cases). An action, especially under the Civil Rights Act, should not be dismissed at the pleading stage unless it appears to a certainty that plaintiff is entitled to no relief under any set of facts which could be proved in support of her claim, *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 857 (2d Cir. 1970). Nevertheless, plaintiff's §1983 claim must be dismissed for failure to allege facts sufficient to support a finding of "state action."

Citing *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), plaintiff argues that the requisite state action is present to support her §1983 claim because the courts of the State of New York have ratified and enforced the provision in the proprietary lease vesting the board of directors with near absolute authority to reject requested ownership transfers. While *Shelley* v. *Kraemer* does establish that judicial enforcement of a private discriminatory contract may constitute state action for purposes of the Fourteenth Amendment, giving rise to a claim under civil rights laws, the state judicial action involved in *Shelley* is clearly distinguishable from that presented here. In *Shelley* discriminatory purposes of a racially restrictive covenant were secured only by reason of the state court's imprimatur. The state had thus provided "the full coercive power of government

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to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners [were] willing and financially able to acquire and which the grantors [were] willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants [was] the difference between being denied rights of property available to other members of the community and being awarded full enjoyment of those rights on an equal footing." 334 U.S. at 19. However, the Court noted, "the restrictive agreements standing alone cannot be regarded as violative of any right guaranteed to petitioners by the Fourteenth Amendment . . . That Amendment erects no shield against merely private conduct, however, discriminatory or wrongful." 334 U.S. at 13.

In the instant case there is no restrictive covenant contained in the proprietary lease which expressly prohibits transfers of ownership on the basis of sex. The lease merely provides that no assignment by a lessee shall be effective against the lessor without its prior consent. The Supreme Court of the State of New York upheld the validity of this provision and acknowledged the broad power of the board of directors to refuse to consent to requested assignments for any reason deemed satisfactory to it except those prohibited by civil rights laws. Even if the board's refusal was motivated by a constitutionally impermissible purpose, any deprivation suffered by plaintiff as a consequence was completed prior to the state court proceedings. Unlike in *Shelley,* the action by the state court here did not effectuate a discriminatory purpose which could not have been secured but for its decision.

Finding plaintiff's reliance on *Shelley* v. *Kraemer* misplaced, this Court must determine whether plaintiff has

alleged facts sufficient to establish the necessary "state action" to support her §1983 claim. Plaintiff argues no other nexus between the state and defendants' allegedly discriminatory conduct but the state court's decision.

In order to subject conduct that is formally private to the limitations of §1983 and the constitutional amendments, it must be shown (1) that the degree of state involvement with the private institution is "significant," (2) that the state's involvement is with the activity that caused the injury (the nexus requirement), and (3) that the state's involvement aids, encourages or connotes approval of the complained of activity. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1971); *Barrett* v. *United Hospital*, 376 F. Supp. 791, 797 (S.D.N.Y. 1974); *see also, Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1975). However, our circuit recognizes a double "state action" standard: "A less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims." *Barrett* v. *United Hospital, supra* at 797; *Jackson* v. *The Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974) (citing cases). The *Barrett* court noted that the rationale behind the exception for cases involving racial discrimination may make it equally applicable to cases involving sex or age discrimination. 376 F. Supp. 797 n.26.

Since plaintiff bases her §1983 claim on alleged sex discrimination, this Court will depart from the three-pronged state action test and more closely scrutinize the state court's involvement to determine whether the alleged discrimination by defendants was impregnated with governmental approval. Under this stricter standard, "indirect governmental participation in the management of an organization

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is persuasive evidence of the existence of 'state action' where the participation is both substantial and other than neutral." *Jackson* v. *The Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1974). Upon review of the evidence presented, it cannot be said that the action of the state court here was either "substantial" or "other than neutral." The state has merely provided a forum to determine the rights of the parties; it has no interest whatever in the outcome of the private litigation. *See, Stevens* v. *Frick*, 372 F.2d 378, 381 (2d Cir. 1967) (citing cases). The purported discrimination was not secured only by reason of the state court's decision. *Cf., Shelley* v. *Kraemer*, 334 U.S. 1 (1948). To say that an open courthouse door constitutes "state action" is to demean the judicial process. Such a conclusion would provide future litigants an opportunity to raise a §1983 claim, based on conclusory allegations of discrimination, every time a state court construed a contractual provision, nondiscriminatory on its face, against the litigant's interests. Accordingly, plaintiff's §1983 claim is dismissed for failure to establish the requisite element of "state action."

Defendants next challenge the sufficiency of plaintiff's §1985(3) claim. In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1970), the Supreme Court set the framework for an adequate complaint under §1985(3). A complaint must allege (1) a conspiracy between two or more persons for the purpose of depriving any person or class of persons of the equal protection of the laws, or of equal privilege and immunities under the law, and (2) an act by one of the conspirators in furtherance of the object of the conspiracy whereby another person was (a) injured, or (b) deprived

of exercising any right or privilege of a citizen of the United States.

Existence of a conspiracy under §1985(3) presents a question of fact. *Crawford* v. *City of Houston, Texas,* 386 F. Supp. 187, 192 (S.D. Texas 1974). Viewing the complaint in a light most favorable to plaintiff, and accepting the facts alleged as true, 2A Moore's Federal Practice ¶12.08 (2d ed. 1974), the Court nevertheless finds that plaintiff has failed to allege facts sufficient to constitute a conspiracy within the meaning of §1985(3) and, therefore, her §1985(3) claim must be dismissed.

The conduct challenged by plaintiff's §1985(3) claim is the action of the individual defendants rejecting her requested ownership transfer taken while acting in their official capacity as directors of the corporation, which she alleges constitutes a conspiracy to deprive her of her civil rights and substantial property rights solely because she is female.

The lease agreement in controversy stipulates that the directors must consent to all proposed assignments of ownership before they are effective against the lessor. While plaintiff specifically states that the board of directors controls the corporation, she never alleges that the directors acted outside their official capacity in reaching their purported discriminatory decision. Plaintiff, thus, seeks to extend §1985(3) to discriminatory business decisions participated in by members of one business entity. *Cf., Baker* v. *Stuart Broadcasting Company,* 505 F.2d 181 (8th Cir. 1974). In dealing with this precise issue, the Seventh Circuit in *Dombrowski* v. *Dowling,* 459 F.2d 190, 196 (7th Cir. 1972) stated:

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> . . . If the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.

Here, the cooperative corporation established the medium, its board of directors, through which it acted in ratifying assignments of ownership. Although the decision plaintiff challenges reflected the collective judgment of "two or more persons," the decision cannot be considered the product of a conspiracy when the board was merely carrying out the corporation's managerial policy. Following the rule stated in *Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953), when acting in an official capacity, "the acts of the agent are the acts of the corporation. . . . A corporation cannot conspire with itself anymore than a private individual can." *See also, Cole* v. *University of Hartford,* 43 U.S.L.W. 2418 (D. Conn. Apr. 15, 1975). That these individuals are, coincidentally, shareholders, tenants and occupants of apartments in the building owned by the defendant corporation, is irrelevant to this Court's determination of a §1985(3) conspiracy, for plaintiff has not alleged that these directors were actuated by any independent personal state in achieving the corporation's purported illegal objective. *See, Cohen* v. *Illinois Institute of Technology,* 384 F. Supp. 202, 205 (N.D. Ill. 1974). Accordingly, plaintiff's §1985(3) claim is dismissed for failure to allege a conspiracy cognizable under the statute.

Having concluded that plaintiff's federal claim must be dismissed for failure to state a cause of action, this

Court, in its discretion, will also dismiss her pendent state claim. Plaintiff will suffer minimal inconvenience by the dismissal of her state claim at a point early in the course of this litigation. Following the Supreme Court's ruling in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966),

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims must be dismissed as well.

This Court's determination that plaintiff's federal claims are inadequate is expressly limited to the finding that she has failed to establish the necessary "state action" required by §1983 or an actionable conspiracy required by §1985(3). Thus, this Court does not reach the substantive issue of sex discrimination.

Since this Court has determined that plaintiff has failed to state a federal claim upon which relief may be granted, the Court need not reach the question of the *res judicata* effect of the prior state court judgment.

For the foregoing reasons, defendants' motion for summary judgment is granted.

Settle order on notice.

Dated: June 30, 1975

/s/ Robert J. Ward
U. S. D. J.

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APPENDIX II

Opinion of Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 372—September Term, 1975.

(Argued October 1, 1975 Decided January 13, 1976.)

Docket No. 75-7443

BARBARA GIRARD,

Plaintiff-Appellant,

v.

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants-Appellees.

Before:

WATERMAN, OAKES and MESKILL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Robert J. Ward, *District Judge*, granting summary judgment to de-

fendants dismissing plaintiff's 42 U.S.C. §1983 claim for lack of "state action" and plaintiff's 42 U.S.C. §1985(3) claim on the ground that defendants did not enter into the requisite conspiracy in refusing to approve of an assignment of a lease or a transfer of stock. Plaintiff's pendent state claim was also dismissed.

Affirmed.

O. JOHN ROGGE, New York, New York (Ballon, Stoll & Itzler, New York, New York, of counsel), *for Appellant.*

MARTIN I. SHELTON, New York, New York (Geoffry R. Handler; James H. Schuyler, Shea, Gould, Climenko, Kramer & Casey, New York, New York, of counsel), *for Appellees.*

MESKILL, *Circuit Judge*:

This is an appeal from an order of the Unted States District Court for the Southern District of New York, Robert J. Ward, *District Judge,* granting defendants' motion for summary judgment by dismissing plaintiff's 42 U.S.C. §1983[1] claim for failure to establish the necessary

1. 42 U.S.C. §1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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"state action," dismissing plaintiff's 42 U.S.C. §1985(3)[2] claim because plaintiff did not establish the actionable "conspiracy" required, and dismissing plaintiff's pendent state claim. *Girard* v. *94th Street and Fifth Avenue Corp.*, 396 F.Supp. 450 (S.D.N.Y., 1975).

In 1968, during their marriage, plaintiff's former husband purchased 497 shares of stock from 94th Street and Fifth Avenue Corporation ("the corporation"), the owner and manager of a cooperative apartment building in New York City. As part of that transaction, Mr. Girard obtained a proprietary lease to the fourth floor of the building. The Stock Certificate contains a restriction that the shares represented thereby may be sold only to the corporation or to an assignee of the proprietary lease after compliance with certain provisions of the proprietary lease, which required that Mr. Girard obtain the written consent of the board of directors before any assignment of his interest in the apartment could become effective; in the event of a violation of this restriction, the corporation could terminate the lease.

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2. The pertinent part of 42 U.S.C. §1985(3) reads:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In 1973, as part of a separation agreement between plaintiff and her husband, Mr. Girard assigned his interest in the apartment to plaintiff in lieu of alimony; the separation agreement was incorporated into the judgment of divorce granted later that year. No consent to assignment from the board of directors had been solicited or received. When plaintiff subsequently requested that she be recognized as the lawful stockholder and tenant, the board of directors, giving no reason, refused its consent, rejected plaintiff's demand that the stock be transferred from Stephen Girard to Barbara Girard and refused to register the transfer on the books of the corporation.

Plaintiff then initiated suit ("Action #1") in the Supreme Court of New York seeking both a declaration that the corporation's refusal was arbitrary, capricious, and unreasonable and an order compelling the corporation to transfer the stock on its books to her and to consent to an assignment of the lease. The corporation commenced its own action ("Action #2") for possession and eviction because of the unauthorized assignment and the failure to pay maintenance costs. The state court granted defendant's motion for summary judgement in Action #1, finding that the consent provision of the lease was enforceable under state law and that "the cooperative apartment corporation had the right to refuse to consent to the transfer of the lease to plaintiff for any reason deemed satisfactory to it (except, of course, those prohibited by the Civil Rights Laws)." The Appellate Division, First Department, affirmed the order and judgment. 46 App.Div.2d 848, 362 N.Y.S.2d 405 (1974). Plaintiff's motion for leave to appeal to the New York Court of Appeals was denied.

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Plaintiff then instituted this suit, alleging that the corporate defendant and the individual defendants, as its officers and board of directors, violated her rights under 42 U.S.C. §1983 by refusing to consent to the assignment of the lease solely because she is female. She also alleged that defendants conspired to deprive her of her civil rights because of her sex, a violation of 42 U.S.C. §1985(3). Finally, plaintiff alleged that defendants violated New York Executive Law §296(5)(a)(1) (1972).[3] Plaintiff sought a declaration of her rightful ownership of the stock and proprietary lease and an injunction preventing any wrongful interference with her peaceful possession of the premises.

I. *Plaintiff's Claim Under 42 U.S.C. §1983*

For the plaintiff to prevail under 42 U.S.C. §1983 she must prove that the defendant, under color of any statute, ordinance, regulation, custom or usage of any state, has deprived her of a right secured by the Constitution and laws of the United States. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 150 (1970). An act chargeable to the state is a necessary element to be pleaded and proved. Plaintiff asserts that the judgment rendered by the state court after Action #1 and Action #2 had been consolidated constitutes state action for §1983 purposes.

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3. New York Executive Law §296(5)(a)(1) reads:

"It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin or sex of such person or persons."

Certainly a state court judgment can be state action. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). We must decide if within the meaning and scope of §1983 the state court's enforcement of the lease provision is a deprivation by state action of a right secured to plaintiff by that statute and the Constitution. In *Shelley* v. *Kraemer, supra*, 334 U.S. at 4, the Supreme Court defined the question before it as "the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property." The white seller in that case had agreed to sell property to a black purchaser contrary to an agreement among property owners. Another owner sought to prevent the transfer by seeking enforcement of the agreement through court action. While stating that the private restrictive agreement itself did not violate Fourteenth Amendment rights, where the purpose of the agreements were secured only by judicial enforcement, the state was a participant within the meaning of the Fourteenth Amendment. *Shelley* v. *Kraemer, supra*, 334 U.S. at 13. The posture of the present case is significantly different from the situation in *Shelley*, however. The contested provision in *Shelley* was racially discriminatory on its face. The lease provision in question here, requiring consent of the board of directors before transfer is effective, can only be described as neutral; there is no suggestion of any prohibition of transfer of ownership on the basis of sex.

Summarizing prior holdings dealing with the state action concept, the Supreme Court has stated that "where the impetus for the discrimination is private, the State must

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have 'significantly involved itself with invidious discriminations,' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). This Court has recognized the existence of a "double standard" of review for state action. In cases involving racial discrimination, a particularly offensive class-based discrimination, the court has used a "less onerous" test than for other claims. See *Jackson* v. *Statler Foundation*, 496 F.2d 623, 629 (2 Cir. 1974); *Weise* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Barrett* v. *United Hospital*, 376 F.Supp. 791, 797 (S.D.N.Y., 1974). In *Weise* v. *Syracuse University, supra*, 522 F.2d at 406, the court applied this less rigorous standard to a claim of sex discrimination, although the court was careful to note that it was not necessary to put sex discrimination in the same category as race discrimination in that case in order to do so.

Even applying this less burdensome standard, the district court below found that the state's participation here was solely to provide a disinterested forum. *Girard* v. *94th Street and Fifth Avenue Corp., supra*, 396 F.Supp. at 455. See also *Stevens* v. *Frick*, 372 F.2d 378, 381 (2 Cir. 1967). In *McGuane* v. *Chenango Court Inc.*, 431 F.2d 1189, 1190 (2 Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), this Court noted that "[n]either, despite some language in *Shelley* v. *Kraemer* . . . can state action be found in New York [sic] providing defendant with the same right to secure the eviction of a tenant by a proceeding in its courts that it gives to almost all landlords; the one thing now almost universally agreed is that such a rationale for that land-

mark decision would be altogether too far-reaching." Since it cannot be said that the state's involvement in this case approves[4] the allegedly discriminatory conduct, we affirm the dismissal by the district court of the §1983 claim.

II. *Plaintiff's Claim Under 42 U.S.C. §1985(3)*

In 1971 the Supreme Court, in *Griffin* v. *Breckinridge*, 403 U.S. 88, 104 (1971), held that §1985(3) reached certain private conspiracies to deprive others of their legal rights. A legally sufficient §1985(3) complaint must aver a conspiracy between two or more persons intended to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law and an act by one of the conspirators in furtherance of the conspiracy which injured another person or deprived him of exercising any right or privilege of a citizen of the United States. See *Griffin* v. *Breckinridge*, *supra*, 403 U.S. at 102-103; *Cameron* v. *Brock*, 473 F.2d 608, 610 (6 Cir. 1973).

Plaintiff argues that her complaint satisfies the threshold requirement of a conspiracy between two or more persons. She has charged both a corporate defendant and individual defendants who constitute the officers and entire

4. Indeed the state recently has enacted civil rights legislation which specifically prohibits cooperatives from refusing to consent to transfers because of sex. New York Civil Rights Law §19-a(1) reads:

> "No corporation formed for the purpose of the cooperative ownership of real estate within the state shall withhold its consent to the sale or proposed sale of certificates of stock or other evidence of ownership of an interest in such corporation because of the race, creed, national origin, or sex of the purchaser."

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board of directors with conspiring to deprive her of her civil rights because of her sex; the individual defendants are alleged to "wholly dominate, operate and control" all of the business and financial affairs of the corporation. Plaintiff claims that as part of the conspiracy, the defendants advised the president and board of directors to deny plaintiff continued occupancy of the premises, refused to permit her to appear at any meeting of the board, refused to provide her with minutes of the meetings, rejected any payments offered or any guarantee of her debt, harassed plaintiff by commencing legal proceedings of eviction and maliciously telephoned her at unreasonable hours to harass and annoy her. Defendants contend that no conspiracy can exist in this case since the corporation's decisions were formulated and carried out by its board of directors, the individual defendants, all of whom acted solely within their official capacities. Accepting plaintiff's allegations as true, the district court found that plaintiff failed to allege facts sufficient to constitute a conspiracy within the meaning of §1985(3). *Girard* v. *94th Street and Fifth Avenue Corp., supra,* 396 F.Supp. at 455. Decisions in this and other circuits fully support the district court's conclusion.

In *Dombrowski* v. *Dowling,* 459 F.2d 190 (7 Cir., 1972), plaintiff alleged that a realty corporation and its employee denied him rental space because many of his clients were members of minority groups. Noting that only one firm was involved and that the individual defendant acted within the scope of his authority as agent for that firm, the Court of Appeals for the Seventh Circuit held that

> ". . . the statutory requirement that 'two or more persons . . . conspire . . .' is not satisfied by proof that a

> discriminatory business decision reflects the collective judgment of two or more executives of the same firm . . . ." 459 F.2d at 196.

Accord, Baker v. *Stuart Broadcasting Company,* 505 F.2d 181, 183 (8 Cir. 1974); *Fallis* v. *Dunbar,* 386 F.Supp. 1117, 1121 (N.D. Ohio, 1974); *Cohen* v. *Illinois Institute of Technology,* 384 F.Supp. 202, 205 (N.D. Ill., 974). *See also Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911, 914 (5 Cir., 1952), *cert. denied,* 345 U.S. 925 (1953), for a discussion of the conspiracy concept in an antitrust context.

Of the numerous authorities plaintiff cites, we find only *Rackin* v. *University of Pennsylvania,* 386 F.Supp. 992 (E.D. Pa., 1974) worthy of discussion.[5] In *Rackin,* plaintiff alleged sex discrimination by the University, its officers, and certain tenured faculty members. The district court found the *Dombrowski* rationale inapplicable to the facts of the case because of the continuing and varied instances of discrimination and harassment: not only was plaintiff given tenure in a department other than the one in which

5. Among others, plaintiff also cites *Pendrell* v. *Chatham College,* 370 F.Supp. 494 and 386 F.Supp. 341 (W.D. Pa., 1974) and *Westberry* v. *Gilman Paper Company,* 507 F.2d 206 (5 Cir. 1975), in support of her conspiracy claim. The decision in *Pendrell* is not instructive regarding the conspiracy element of a §1985(3) claim. The two district court opinions in *Pendrell* focused on the state action aspect of a §1983 claim against a private university and whether plaintiff satisfied the second element of a §1985(3) claim, which is not at issue here. Insofar as the conspiracy aspect of a §1985(3) claim is concerned, the district court merely stated that "[h]er complaint clearly alleges that the 'defendants, some or all of them, conspired and acted in concert pursuant to a common scheme . . .', thus satisfying element (1) [conspiring] of *Griffin.*" *Pendrell* v. *Chatham College, supra,* 370 F.Supp. at 500. Because there is no analysis, it is difficult to assign much weight to this finding.

Westberry v. *Gilman Paper Company, supra,* 507 F.2d at 216, was withdrawn after a rehearing *en banc* with orders to the district court to dismiss as moot, "so that it will spawn no legal precedents."

it was earned, a decision clearly contrary to normal university policy, but subsequently she had been assigned only freshmen courses outside her area of specialty. The court found that these actions, more than a single decision by one business entity, supported a conspiracy allegation. 386 F.Supp. at 1005.

The situation at the University of Pennsylvania was unlike the situation here. Here there is but one single business entity with a managerial policy implemented by the one governing board, while at the University of Pennsylvania, each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policymaking body but of several bodies; thus the court correctly held that the allegations supported a claim of conspiracy among them. Here plaintiff's allegations of multiple acts by the directors are not alleged to be other than the implementation of a single policy by a single policymaking body. Indeed, defendants here would seem to be safely within the area of the *Dombrowski* decision and quite outside that of *Rackin*.

In the instant case, the individual defendants comprise the board of directors through which the corporation acted. The lease agreement specifically required the consent of the board before any transfer of ownership interest could be effective. In claiming that defendants advised the board and president to deny her continued occupancy, refused to permit a personal appearance, provide her with minutes, accept payments or a debt guarantee and commenced legal action, plaintiff does not allege that any of the individual

defendants acted in any other capacity than his official role of director. As found by the court below,

> "Although the decision plaintiff challenges reflected the collective judgment of 'two or more persons,' the decision cannot be considered the product of a conspiracy when the board was merely carrying out the corporation's managerial policy." 396 F.Supp. at 455-56.

Plaintiff next argues that defendants conspired by maliciously telephoning her at unreasonable hours in order to harass her into giving up her struggle to maintain occupancy. Again, plaintiff does not assert that the individual defendants were acting other than as officers and directors; the complaint identifies them only by their corporate status. The fact that they were also shareholders and tenants of apartments in the defendant-corporation's building does not aid plaintiff's case, since she did not allege that the individual defendants were motivated by any independent personal stake in achieving the corporation's objective. In *Cole* v. *University of Hartford*, 391 F.Supp. 888, 893 (D. Conn., 1975) the court stated that

> "[s]imply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiff must also allege that they acted other than in the normal course of their corporate duties. . . . '[I]t is not alleged that the individual defendants committed any act of a personal nature except in connection with the corporate affairs.'"

Accordingly, we hold that plaintiff's §1985(3) claim must be dismissed for failure to state an actionable conspiracy under the statute.

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III. *Plaintiff's State Claim*

Plaintiff also alleged a violation of New York Executive Law §296(5)(a)(1). However, since we have dismissed plaintiff's federal claims for failure to state a cause of action, we will avoid making "[n]eedless decisions of state law" and, exercising our discretion, dismiss her pendent state claim. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966).

Finally, the Court need not decide what effect the prior state court decision would have had upon the present action under the doctrine of *res judicata.*

The order of the district court is affirmed.

Dissenting Opinion, Oakes, C. J.

OAKES, *Circuit Judge* (dissenting):

I respectfully dissent.

In my view the complaint alleges facts which are sufficient to state a substantial claim under 42 U.S.C. §1985(3). Since appellant has also raised a claim under the laws of New York, we have pendent jurisdiction over the state law claim so long as "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966). *See also Van Gemert* v. *Boeing Co.*, 520 F.2d 1373, 1382 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3272 (U.S. Nov. 11, 1975).[1] Appellant's complaint cites New York Executive Law §296(5)(a)(1) (McKinney 1974) as the source of her state law claim.[2] However, this section of the New York Human Rights Law is not enforceable in federal court, but is part of an adminis-

1. *See also Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970); *Bell* v. *Hood*, 327 U.S. 678 (1946); *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933).

2. At the time appellant filed this action, New York Executive Law §296(5)(a)(1) provided:

> (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:
>
> (1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin or sex, or disability of such person or persons.

Paragraph (1) has since been amended to include the words "or marital status" after the word "disability."

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trative scheme which is administered by the state Division of Human Rights. The Division investigates complaints, has hearings and issues orders upon complaints filed by persons who claim their rights have been violated. *Id.* §297. These orders are subject to judicial review in the state courts. *Id.* §298. Obviously the federal courts cannot take jurisdiction over the state remedy with its administrative procedures, exhaustion of which is essential.

But New York Civil Rights Law §19-a (McKinney 1975-1976 Supp.) provides a basis for a pendent state claim which is inherent in the appellant's pleaded allegations. That section provides that

> No corporation formed for the purpose of the cooperative ownership of real estate within the state shall withhold its consent to the sale or proposed sale of certificates of stock or other evidence of ownership of an interest in such corporation because of the race, creed, national origin, or sex of the purchaser.

Id. It is obvious that the claim arising under this state statute[3] has the same "common nucleus of operative fact" as appellant's federal claim. Therefore, "considerations of judicial economy, convenience and fairness to the litigants," *United Mine Workers of America* v. *Gibbs, supra,* 383 U.S. at 726, appear at this stage of the case to weigh in favor of resolution of the state claim in the federal court proceedings.

It is well to remember that federal jurisdiction is conferred here by 28 U.S.C. §1343(1), (3), (4), and 28 U.S.C.

3. New York Civil Rights Law §19-b (McKinney 1975-1976 Supp.) provides that "[a]ny person aggrieved by a violation of section nineteen-a . . . shall have a right of action in any court of appropriate jurisdiction to restrain such violation and for other equitable remedies, including such affirmative and other relief as may be necessary to undo the effects of such violation."

§1331(a).[4] Resort is had to 42 U.S.C. §1985(3) only to determine whether a claim is stated thereunder, since it creates the cause of action. *See McNeese* v. *Board of Education,* 373 U.S. 668, 671 & n.1 (1963) (§1983 action); *Byrd* v. *Sexton,* 277 F.2d 418 (8th Cir.) (Blackmun, Circuit Judge), *cert. denied,* 364 U.S. 818, 819 (1960); *Campbell* v. *Glenwood Hills Hospital, Inc.,* 224 F. Supp. 27, 29 (D. Minn. 1963).

Where, as here, allegations in a complaint are sufficient to state a §1985(3) conspiracy claim, the trial court may resolve both the §1985(3) claim and the state claim, or, which may be preferable, avoid resolving the §1985(3) claim on the merits if the pendent state claim permits disposition of the case. Here, as in *Siler* v. *Louisville & Nashville Railway Co.,* 213 U.S. 175, 191 (1909), once a federal question is substantially alleged, the court has

> the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

To put it another way, resolution of the state law claim here alone is proper, and would permit avoidance of an "avoidable" decision under federal civil rights law. *See* P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System

4. Probably §§1331(a) and 1343(1) are the most applicable, §1331(a) because the jurisdictional amount test is clearly satisfied and it is property rights of which appellant claims to be deprived, *see Hague* v. *CIO,* 307 U.S. 496, 518-32 (1939); Note, *Jurisdictional Amount in Civil Rights Cases,* 9 U. Chi. L. Rev. 302 (1942), and §1343(1) because it is the jurisdictional counterpart to 42 U.S.C. §1985(3). Moreover, unlike §1343(3), neither §1331(a) nor §1343(1) contains a requirement of infringement of rights under "color of state law." *See Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 547 (1972).

(2d ed. 1973) at 922-23; C. Wright, Law of Federal Courts (1970) §19, at 62-65. *See generally* Note, *UMW* v. *Gibbs and Pendent Jurisdiction,* 81 Harv. L. Rev. 657 (1968).

The complaint names three individual defendants as well as the corporate defendant and alleges that they have conspired with each other to deprive appellant of her civil and property rights. The court below found that appellant's complaint did not state a claim under §1985(3) because the court interpreted the complaint as failing to assert that the individual defendants were acting outside their official capacity as directors of the defendant corporation. Thus, the court reasoned, the actions of the individual defendants "cannot be considered the product of a conspiracy when the board was merely carrying out the corporation's managerial policy." 396 F. Supp. 450, 456.

It is, to be sure, basic conspiracy law that a corporation cannot conspire with its agents or employees acting within the scope of their employment, *Pearson* v. *Youngstown Sheet & Tube Co.,* 332 F.2d 439 (7th Cir.), *cert. denied,* 379 U.S. 914 (1964). And it has been said that if the conspiratorial conduct challenged is essentially a "single act of discrimination by a single business entity," the fact that two or more agents participated in the decision or act will "normally not constitute" a §1985(3) conspiracy. *Dombrowski* v. *Dowling,* 459 F.2d 190, 196 (7th Cir. 1972). But here the individual defendants were not alleged to be simply agents or employees of the corporate defendant, nor to be acting in the scope of their employment, nor to be acting for the corporate benefit. A closer reading of the complaint indicates that appellant explicitly alleges that the injurious acts of the individual defendant conspirators were indeed committed in their individual, not their corporate, capacities.

Here the complaint alleges that the individual defendants "constitute the officers and the entire Board of Directors of the corporate defendant, and *wholly dominate, operate and control all of its business and financial affairs.*" (Emphasis added.) These allegations alone serve to distinguish this case from *Dombrowski, supra.* As recognized by Judge McMillen in *Cohen* v. *Illinois Institute of Technology*, 384 F. Supp. 202, 205 (N.D. Ill. 1974), the case is entirely different when the individual officers or directors are "alleged to have controlled [the corporate defendant] or to have personally committed acts of discrimination. . . ."[5] In such a case, as here, the individuals are not acting at the direction of their corporate employer or necessarily for its benefit.

Further, the complaint alleges that the defendants, "in furtherance of the said design and conspiracy,"

> [a]dvised, caused, permitted and allowed the President and the Board of Directors of the corporate defendant to deny plaintiff permission and authority to continue occupancy of the subject premises.

Surely the implication of such an allegation is not that the defendants in their capacity as corporate agents advised themselves to act in their capacity as corporate agents. Rather, it is that defendants in their individual capacities determined according to personal motives that they would cause managerial action by the president and the board of directors to serve their individual interests. The crux of this allegation is that defendants acted, albeit

5. While in *Baker* v. *Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974), two of the three named individual defendants owned 100 per cent of the stock of the corporation, the nature of this ownership or its relevance to the alleged conspiracy was not discussed. The decision cannot therefore be deemed illuminating on this point.

behind the screen of their corporate roles, in an individual and not an official capacity.

Here, indeed, the complaint also alleges that "the purpose, intent and result" of the conspiracy "was to enable, permit and allow the said defendants to receive for their own use and benefit and not for the benefit of plaintiff the sole and exclusive right to determine who shall own said shares of stock and the proprietary lease in the subject premises. . . ." (Emphasis added.) As shareholders in the cooperative corporation and as leaseholders in the building it would be to their individual financial benefit to have the Girard apartment revert to the corporation and it might very well be to their personal benefit to acquire the apartment for themselves. These allegations as to personal motives alone further serve to distinguish this case from the corporate-agent cases referred to above. *See Nelson Radio & Supply Co.* v. *Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

Moreover, acts engaged in as a part of the conspiracy by defendants allegedly include deliberate and malicious "telephone calls to plaintiff at unreasonable hours solely for the purpose of harassing and annoying her in order to force plaintiff to vacate said premises. . . ." Such conduct, if established, would surely be individual and noncorporate in nature; nor are these allegations to be lightly disregarded or passed off as being de minimis. *Cf. Rackin* v. *University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974).

All of these factors in my view make the question whether the alleged §1985(3) conspiracy existed one that certainly is substantial, so as to supply, even if it does not succeed on its own merits, clear pendent jurisdiction of the state law claim.

There is, to be sure, another question, left open in *Griffin* v. *Breckinridge*, 403 U.S. 88, 102 n.9 (1971), "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under §1985(3). A series of recent Supreme Court cases, perhaps the foremost of which is *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), point the way toward an affirmative answer in cases involving bias on account of sex. One would estimate that deprival of valuable property rights on account of a person's gender would constitute a denial "of the equal protection of the laws" within §1985(3), as well as within the Fourteenth Amendment. *See Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

There is, in short, a claim under this federal civil rights statute to warrant federal jurisdiction under 28 U.S.C. §1331(a) or §1343(1), and under the principles of pendent jurisdiction above enumerated clearly to support consideration of the state law claim under the New York Civil Rights Law. I would reverse and remand for that consideration.[6]

---

6. Appellees have argued that this suit is barred by the res judicata effect of a prior state court action brought by appellant against these same appellees. In the state court litigation, however, appellant merely contended that the appellees' refusal to assign to her the shares of the corporation owned by her former husband was in breach of the lease agreement and state corporations law. No violation of civil rights was alleged in the state court action, and the state judge, in ruling against appellant's claim, stated only that appellees have the right to refuse to consent to the transfer of a cooperative lease for any reason "except, of course, those prohibited by the Civil Rights Law." *Girard* v. *94th Street and Fifth Avenue Corp.*, Civ. No. 15173/73 (Supreme Court, New York County, July 8, 1974) (memorandum opinion). Only the other day, in *Herendeen* v. *Champion International Corp.*, No. 75-7083 (2d Cir. Nov. 10, 1975), slip op. 483, we held under New York law that where a plaintiff in a second suit sets forth "an independent claim of defendant wrongdoing" the first suit does not bar the second even though the plaintiff "could have joined" the second suit claim with the first. *Id.* at 489-91. While Mrs. Girard could have joined her civil rights claim in her state court suit she did not do so. She is not barred, therefore, from asserting it now.

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APPENDIX III

Stay of Mandate of Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

75-7443

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of February, one thousand nine hundred and seventy-six.

BARBARA GIRARD,

Plaintiff-Appellant,

v.

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant dated January 28, 1976 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted, provided said application is filed within 30 days from the date of filing of this order, in default of which mandate shall issue.

/s/ STERRY R. WATERMAN

STERRY R. WATERMAN

/s/ JAMES L. OAKES

JAMES L. OAKES

/s/ THOMAS J. MESKILL

THOMAS J. MESKILL

Circuit Judges

Supreme Court of the United States

APR 15 1976
MICHAEL RODAK, JR., CLERK

October Term, 1975

No. 75-1337

BARBARA GUTMACHER GIRARD,

Petitioner,

vs.

94th STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY AND THOMAS E. MURRAY,

Respondents.

BRIEF AND APPENDIX FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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28 U.S.C. §1738 (1966) 3, 23

42 U.S.C. §1983 ..... 2, 6, 9, 13, 14, 15, 17, 21, 23, 24

42 U.S.C. §1985(3) 2, 3, 6, 8, 9, 11, 12, 13, 18, 19, 21, 23

United States Constitution Cited:

First Amendment 24

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Fourteenth Amendment, Section 1 and 5 ..... 3, 14, 15

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Other Authority Cited:

Weinstein-Korn-Miller, New York Civil Practice, Par. 5011.17 at p. 50-103 23

APPENDIX

A — Petitioner's Complaint 1a

In The

Supreme Court of the United States

October Term, 1975

No. 75-1337

BARBARA GUTMACHER GIRARD,

Petitioner,

vs.

94th STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY AND THOMAS E. MURRAY,

Respondents.

BRIEF AND APPENDIX FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of Judge Robert J. Ward of the District Court for the Southern District of New York (App. I of Petition) is reported at 396 F. Supp. 450. The affirmance of the Court of Appeals for the Second Circuit by Judge Thomas J. Meskill, in which Judge Sterry R. Waterman joined, and the dissent by Judge James L. Oakes, are not yet reported but are annexed as Appendix II to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Do the allegations of the complaint set forth facts sufficient to constitute a conspiracy within the meaning of 42 U.S.C. §1985(3)?

2. Did the acts of respondent 94th Street and Fifth Avenue Corporation (the "Corporation"), a corporation owning a cooperative apartment house in New York City, constitute "state action" so as to raise a claim in petitioner under 42 U.S.C. §1983 merely because the State of New York provided a disinterested forum to resolve a dispute which arose when the Corporation, pursuant to and consistent with the terms of a typical provision in lease agreements relating to co-operative apartments, refused to consent to the transfer of 497 shares of its stock (the "stock") to petitioner?

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3. Are petitioner's claims barred by reason of the doctrine of *res judicata?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provisions involved (the Fifth Amendment to the United States Constitution and Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution) and the pertinent sections of the Civil Rights Act of 1871 (42 U.S.C. §§1983 and 1985(3) (1974)) are set forth in the petition at pages 3-4. The pertinent provisions of 28 U.S.C. §1738 (1966) provide:

> "[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

Petitioner commenced this action on February 10, 1975, when the complaint was filed (1A).[1] The complaint alleges that the petitioner resides at, and that the Corporation owns and manages, the cooperative apartment building at 1125 Fifth Avenue in the City of New York (3A-4A; Complaint,[2] ¶¶ 3-5).

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1. References are to pages of the Appendix in the Court of Appeals unless otherwise indicated.

2. A copy of petitioner's complaint is appended hereto as Appendix A.

The individual respondents are alleged to constitute the Corporation's officers and Board of Directors (4A; Complaint, ¶ 6).

According to the complaint, in January of 1968, Stephen Girard, who was then petitioner's husband, (i) purchased 497 shares of the stock; (ii) became the owner of a proprietary lease (the "lease") with respect to the fourth floor apartment in the Corporation's building; and (iii) with petitioner occupied said apartment (4A-5A; Complaint, ¶¶ 7-9). Thereafter, petitioner and Stephen Girard allegedly entered into a separation agreement which, *inter alia*, assigned the stock and the lease to petitioner (5A; Complaint, ¶¶ 11-12).

Petitioner is then alleged to have demanded that the Corporation consent to the transfer of the stock from Stephen Girard to petitioner, but the Corporation allegedly refused without permitting petitioner to appear at Board of Directors' meetings and without providing petitioner with minutes of said meetings (5A, 6A-7A; Complaint, ¶¶ 13-15).

Nowhere does the record indicate that the individual respondents acted outside their capacities as directors (100A; App. I of Petition, p. A11). Nowhere does the record indicate that the refusal by the Corporation to consent to the transfer of the stock from Stephen Girard to petitioner was imbued with any "state action." Nowhere (contrary to petitioner's brief at page 5) does the record indicate that the apartment in issue was petitioner's marital residence. The separation agreement shows instead that petitioner was residing in England when Stephen Girard assigned the stock to her (38A). And, nowhere (contrary

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to petitioner's brief at page 5) does the record indicate that the stock was bought by Stephen Girard and petitioner together. The record shows that the stock was purchased by Stephen Girard only (13A-33A, 67A).

The Lease

The refusal to consent to the assignment from Stephen Girard to petitioner could not have come as a surprise to petitioner. The lease agreement entered into between Stephen Girard and the Corporation expressly provided that the Board of Directors of the Corporation, on the Corporation's behalf, had to consent to any such assignment. The lease in relevant part provides:

> "Except as provided in Article IV of this lease [relating to cancellation of the lease], the Lessee shall not assign this lease, or any interest therein, and no such assignment shall take effect as against the Lessor for any purpose, unless and until all of the following requirements have been complied with and satisfied:
>
> * * *
>
> 4. A written consent to such assignment, authorized by a resolution of the Board of Directors, or signed by a majority of the directors . . must be delivered to the Lessor." (21A).

Such a provision is typical with respect to cooperative apartment leases in New York City and is enforceable under New York law (80A).

The Decision of the District Court

By notice of motion dated March 18, 1975, respondents moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted or, in the alternative, for summary judgment (56A). Affidavits and exhibits were submitted to the District Court by both sides and the court treated the motion as one for summary judgment (90A).

The District Court granted summary judgment to respondents:

(1) dismissing petitioner's §1983 claim for failure to allege facts sufficient to support a finding of "state action" (94A-98A; App. I of Petition, pp. A6-9);

(2) dismisisng petitioner's claim for relief under §1985(3) because, even if the facts alleged were true, petitioner failed to allege facts sufficient to constitute a conspiracy within the meaning of §1985(3) (98A-100A; App. I of Petition, pp. A10-11); and

(3) dismissing petitioner's pendent state claim (101A; App. I of Petition, pp. A11-12).

The District Court did not consider the additional argument raised by respondents that petitioner's claims were barred by the doctrine of *res judicata* (101A-102A; App. I of Petition, p. A12).

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Petitioner then appealed to the United States Court of Appeals which affirmed the order of the District Court.

The Prior State Court Actions

Prior to the institution of this case, an action ("Action No. 1") entitled, "Barbara Girard, plaintiff, against 94th Street and Fifth Avenue Corporation, defendant," Index No. 15173/73, was brought by petitioner in the Supreme Court of the State of New York, New York County, on the same cause of action and relating to the same apartment as the instant action (61A-66A). Petitioner there, as here, recited the transfer of the stock and lease from Stephen Girard to petitioner and her request to the Corporation that it consent to said transfer (65A). Petitioner also, in Action No. 1, sought a declaration that the Corporation's refusal to consent was "arbitrary, capricious and unreasonable" (65A-66A).

Also prior to the institution of this case, but after the Corporation had terminated the lease by notice as provided for in the lease (25A-26A) on account of the improper assignment of the stock, an action ("Action No. 2") was commenced by the Corporation against Stephen Girard and against petitioner herein in Civil Court, County of New York (109A). Action No. 2 was a holdover proceeding for possession of the apartment (68A-80A).

The Corporation moved for summary judgment in Action No. 1. The motion was granted (75A, 78A-80A). The court held that the Corporation had the right and power to reject petitioner's demand to transfer the stock and to refuse to consent to the assignment of the lease, and that such refusal was authorized by and consistent with the terms of the lease (78A-80A).

The Appellate Division, First Department, affirmed the order and judgment made by the New York Supreme Court, New York County (60A).

Petitioner's motion for leave to appeal to the Court of Appeals was denied on January 9, 1975 (60A).

One month later, petitioner commenced this action (1A).

ARGUMENT

The issues involved in this case are narrow, and no amount of hyperbole can convert this case into one warranting review by this Court on certiorari. We are here only concerned with whether the allegations of petitioner's complaint allege facts sufficient to constitute a conspiracy within the meaning of §1985(3), a necessary element of a claim under that section, and with whether the State of New York merely by providing an impartial forum for the litigation of complaints, can convert purely private acts into those of the state so as to subject litigants to suits under §1983. Both the District Court and the Court of Appeals answered both questions in the negative.

The particular allegations of the complaint only allege that the Corporation, through its Board of Directors (the individual respondents), refused to consent to the transfer of the stock to the petitioner. Nowhere is it alleged that the directors were acting in other than their capacities as directors. And just as a private individual cannot conspire with himself, a corporation cannot conspire with itself.

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Nor can it be said that any time state courts afford a disinterested forum for the resolution of purely private disputes, the actions which are the subject of the disputes become imbued with "state action" so as to raise a claim in one of the disputants under §1983. As the Court of Appeals said below, quoting from its prior decision in *McGuane v. Chenango Court Inc.*, 431 F.2d 1189, 1190 (1970), *cert. denied*, 401 U.S. 994 (1971):

> "'[N]either despite some language in *Shelley v. Kraemer* can state action be found in New York providing defendant with the same right to secure the eviction of a tenant by a proceeding in its courts that it gives to all landlords; the one thing now almost universally agreed is that such a rationale for that landmark decision would be altogether too far-reaching.'" (App. II of Petition, p. A19).

Accordingly, on this particular complaint and on these particular facts, the decision of the District Court and the affirmance of the Court of Appeals were manifestly correct. There is no important question of federal law requiring decision by this Court.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

A. There Can Be No Conspiracy By A Single Entity.

For relief to be granted under §1985(3), a plaintiff must plead and prove that the defendants conspired or went in

disguise on the highway or on the premises of another.[3] *Griffin v. Breckinridge*, 403 U.S. 88, 102-103 (1971). Since there is nothing in the complaint or the record about a "disguise," petitioner must plead and prove the existence of a conspiracy.

When the Corporation refused to consent to the transfer of stock from Stephen Girard to petitioner, it was acting pursuant to the provisions of the lease. The lease stipulates that consent is required before an assignment can take effect. Understandably, the Corporation's decision on petitioner's request was formulated and carried out by the members of its Board of Directors, the individual respondents herein. No allegation is made that these directors were acting outside of their official capacities in refusing the requested transfer.

Accordingly, none of the respondents were, or could have been, part of a conspiracy.

> "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

These precepts have been applied in factual circumstances very close to those involved here. In *Dombrowski v. Dowling*,

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3. The opening phrase of the statutory provision states: "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another . . ."

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459 F.2d 190 (7th Cir. 1972), the plaintiff, an attorney, alleged that the corporate manager of a building and two of the manager's employees, in violation of §1985(3), conspired to and did refuse to rent the plaintiff space because a substantial number of his clients were black. In holding that judgment for the plaintiff could not be grounded on §1985(3), then Circuit Judge Stevens wrote for the court as follows:

> "[T]he statutory requirement that 'two or more persons . . . conspire or go in disguise on the highway,' is not satisfied by proof that a discriminatory business decision reflects collective judgment of two or more executives of the same firm."

Dombrowski has been accorded substantial, if not decisive, weight on similar conspiracy issues by many courts, including the District Court and the Court of Appeals below (App. I of Petition, pp. A10-11; App. II of Petition, pp. A21-23). See, *e.g.*, *Baker v. Stuart Broadcasting Company*, 505 F.2d 181, 183 (8th Cir. 1974); *Cole v. University of Hartford*, 391 F. Supp. 888 (D. Conn. 1975); and *Fallis v. Dunbar*, 386 F. Supp. 1117 (N.D. Ohio, 1974).

In the *Fallis* case, the plaintiffs, former tenants of the corporate defendants, alleged that the renewal of their lease was denied by the corporate defendants and their employees (who were also named as defendants), and that said defendants sought to evict them, all for organizing and being active in a tenants' association.

Although there was some question about whether plaintiffs had abandoned their §1985(3) claim, the court ruled as follows in granting defendants' motion to dismiss:

> "Given the fact that only Dunbar Real Estate Co. and its officers, employees and agents were involved in the actions complained of, the Court finds that there were not 'two or more persons' who conspired to deprive plaintiffs of any civil rights. A corporation exists as a person only in a legal sense; it can act and speak only through its officers, employees, and agents. The action of Roger Dunbar in deciding to evict plaintiffs and the actions of other employees and agents in carrying out that decision were within the scope of their employment by Dunbar Real Estate Co. As such, the conspiracy requirement of §1985(3) has not been met." 386 F. Supp. at 1121.

Petitioner also points to the supposed malicious telephone calls she received which she claims were made by the individual respondents. But again, petitioner does not assert that the individual respondents were acting other than as officers and directors. As the Court of Appeals below said (App. II of Petition, A24):

> "[T]he complaint identifies them [the individual respondents] only by their corporate status. The fact that they were also shareholders and tenants of apartments in the defendant-corporation's building does not aid plaintiff's case, since she

did not allege that the individual defendants were motivated by any independent personal stake in achieving the corporation's objective. In *Cole v. University of Hartford*, 391 F. Supp. 888, 893 (D. Conn., 1975) the court stated that

> '[s]imply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiff must also allege that they acted other than in the normal course of their corporate duties. . . . "[I]t is not alleged that the individual defendants committed any act of a personal nature except in connection with the corporate affairs."'"

Accordingly, the Court of Appeals properly affirmed the District Court's dismissal of petitioner's §1985(3) claim for failure to state an actionable conspiracy under the statute.

B. Respondents Committed No Acts "Under Color Of" Law

For petitioner to establish her entitlement to relief under §1983, she must show that respondents acted "under color of" law to deprive her of a constitutionally secured right.[4] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). In cases under §1983, "under color of" law has consistently been treated as the

4. The beginning phrase of §1983 provides: "Every person who, under color of any statute, ordinance, custom or usage of any State or Territory. . . ."

same thing as the "state action" required under the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794 n. 7 (1966) (citing cases).

But, the Corporation in refusing to consent to said transfer was merely exercising its rights under a clause in the lease, which clause the New York Supreme Court found to be enforceable (80A). In these circumstances, petitioner's claim that respondents violated §1983 is without substance. There was no "state action." As was said in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972):

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Case, supra*, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

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It is evident in the instant case that not only has there been no "significant involvement" by the state in the activities of respondents, but there has been no state involvement at all.

Petitioner's position on her §1983 claim appears to be that because the Corporation, by summary proceeding in the state courts, sought to evict petitioner and to terminate the lease, the Corporation's acts in denying the transfer of the stock was somehow infused with "state action." The long and short of petitioner's position is that any time reference is made to a state-provided forum for resolution of a dispute, however private, sufficient "state action" is present to support a §1983 claim. Petitioner cites only one case in support of this position — *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Petitioner's argument has been soundly refuted not only in this case but in other cases.

> "Citing Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), [plaintiff] argues that the requisite state action is present because Pennsylvania has provided a forum for the . . . lawsuit, . . . While Shelley v. Kraemer does establish that the action of state courts may constitute state action for purposes of the Fourteenth Amendment and thus may give rise to a claim under the Civil Rights Act of 1871, the state judicial action involved in *Shelley* is readily distinguishable from that presented here. In *Shelley* the state courts, following a settled line of

> state decisions, had enforced racially restrictive covenants in deeds. The state had thus provided 'the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners [were] willing and financially able to acquire and which the grantors [were] willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants [was] the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.' 334 U.S. at 19, 68 S. Ct. at 845.
>
> . . . Thus far Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state in the sense that [plaintiff] suggests." *Stevens v. Frick*, 372 F.2d 378, 381 (2d Cir. 1967), *cert. denied*, 387 U.S. 920 (1967).

Accordingly, as a general principle, the filing of a suit by a private party is not "state action." More specifically, courts have consistently held that the institution of an eviction suit by a

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landlord does not constitute "state action." *McGuane v. Chenango Court, Inc.*, 431 F.2d 1189, 1190 (2d Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); *Weigand v. Afton View Apartments*, 473 F.2d 545, 548 (8th Cir. 1973); *Mullarkey v. Borglum*, 323 F. Supp. 1218, 1225-1227 (S.D.N.Y. 1970); *Fallis v. Dunbar, supra*, 386 F. Supp. at 1120-1121.

In *McGuane*, a case having facts very similar to those here, and a case where this Court denied certiorari, the plaintiff, complaining that her landlord refused to renew her lease, brought an action under §1983 alleging violation of her civil rights. The Court dismissed the plaintiff's §1983 claim, saying at page 1190:

> "Neither, despite some language in Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), can state action be found in New York providing defendant with the same right to secure the eviction of a tenant by a proceeding in its courts that it gives to all landlords; the one thing now almost universally agreed is that such a rationale for that landmark decision would be altogether too far-reaching."

Accordingly, plaintiff's claim under §1983 fails because of the absence of the requisite "state action."

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner asserts that this Court should review the decision of the court below because there is a conflict among the Circuits regarding the interpretation of the conspiracy requirement of §1985(3). Petitioner, however, is seriously mistaken. She points to decisions in four Circuits: the Eighth, Sixth, Fifth and Third.

First, the Eighth Circuit is fully in accord with the holding of the Court of Appeals below. In *Baker v. Stuart Broadcasting Company*, 505 F.2d 181 (8th Cir. 1974), the plaintiff, a prospective employee of the defendant, claimed that the defendant and some of its officers conspired to deny her employment on account of her race. In dismissing the complaint, the court, at page 183 and relying on then Circuit Judge Stevens' decision in *Dombrowski*, ruled as follows:

> "In dealing with this precise issue of an alleged conspiracy in a business situation, the Seventh Circuit Court of Appeals in Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972), observed:
>
> 'We . . . believe that the statutory requirement that "two or more persons . . . conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of

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> the same firm . . . [I]f the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.'
>
> The record shows that Ms. Baker's complaint is directed at a radio broadcasting company which, through its personnel or owners, declined to employ her. The petitioner does not allege the necessary elements of conspiracy required to maintain a cause of action pursuant to 42 U.S.C. §1985(3)."

The *Baker* case was decided three years after *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971), the Eighth Circuit case petitioner claims is at variance with the decision below.

Second, the Sixth Circuit case cited by petitioner, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), has nothing to do with conspiracies by corporations and their officers or directors. And, in any event, the *Fallis* case, discussed at length above, is a case decided in the Sixth Circuit subsequent to the decision in *Cameron* and is in full accord with the decision below.

Third, the Fifth Circuit's opinion in *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 216 (1975), was withdrawn, the judgment of the court was vacated, and the cause was

"remanded to the district court with directions to dismiss as moot, *so that it will spawn no legal precedents.*" (Emphasis added.) *McLellan v. Mississippi Power & Light*, No. 73-3266 (5th Cir. Feb. 5, 1976) is also not in point. There a conspiracy was alleged by a discharged employee against his employer, his union, and a local of his union.

Fourth, the Third Circuit case to which petitioner refers, *Richardson v. Miller*, 446 F.2d 1247 (1971), contains no discussion whatever on the conspiracy point.

Finally, other cases cited by petitioner, including *Rackin v. University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974), and *Pendrell v. Chatham College*, 370 F. Supp. 494 and 386 F. Supp. 341 (W. D. Pa. 1974), are equally unavailing. We refer the Court to the Court of Appeals' discussion of those authorities (App. II of Petition, pp. A22-23).

III.

PETITIONER'S CLAIMS IN THIS ACTION ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Because summary judgment was entered below dismissing the complaint on the grounds described above, and because the Court of Appeals affirmed the order of the District Court, respondents' assertions that petitioner's claims were barred by the doctrine of *res judicata* were not considered below.[5]

5. In dissent in the Court of Appeals Judge Oakes did indicate, in a footnote, that he thought the suit was not "barred by the *res judicata* effect."

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Respondents contend, however, that the doctrine of *res judicata* provides yet another independent basis for the judgment of dismissal entered below.

Petitioner could have come directly to the federal courts and asserted what she contends is the Corporation's wrongful refusal to consent to the transfer of the stock. Instead, petitioner chose a state forum for judicial review. She began Action No. 1 in August of 1973 and it was concluded on January 9, 1975, when leave to appeal the Appellate Division's affirmance of the New York Supreme Court's order and summary judgment in the Corporation's favor was denied. Thereafter she commenced this action.

In her state court action, petitioner alleged that:

> "The rejection by defendant corporation to transfer the aforesaid stock is an *arbitrary, capricious and unreasonable* determination that will prejudice plaintiff . . ." (63A). (Emphasis added.)

Also petitioner sought a declaration from the court that the Corporation's refusal to consent to the transfer of the stock was "arbitrary, capricious and unreasonable" (65A).

Having chosen the state forum, petitioner should have raised all relevant issues available to her in the state action, including the claimed violations of §§1983 and 1985(3). State courts are competent to adjudicate questions of federal

constitutional rights. *NAACP v. Button*, 371 U.S. 415, 427-428 (1963); *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470, 476 (1930); *Doherty v. Meisser*, 66 Misc. 2d 550, 555 (N.Y. Sup. Ct., Nassau Co., 1971).

The judgment entered in Action No. 1 specifically provided:

> "3. That defendant corporation has the right or power to refuse to consent to the assignment of the proprietary lease from Stephen S. Girard to Barbara Girard of the fourth floor Apartment at 1125 Fifth Avenue, New York, New York 10028; and
>
> 4. That the defendant corporation's refusal to transfer the stock of defendant corporation from Stephen S. Girard to Barbara Girard and to consent to the assignment of the proprietary lease to the apartment located on the fourth floor of 1125 Fifth Avenue, New York New York, was authorized by and consistent with the terms of said proprietary lease; . . ." (76A).

Well established principles of the doctrine of *res judicata* provide that said judgment is a bar to a subsequent action between plaintiff and the Corporation involving the same cause of action. The relief petitioner seeks in this action is just what the quoted provision of the state court judgment says she cannot have. The rule was put forth succinctly in *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968):

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> "The general rule of *res judicata* is that a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which *might have been*, but were not, actually raised and decided in that action. The first judgment, when final and on the merits, thus puts an end to the whole cause of action." (Emphasis added.)

Of particular significance to these facts is 28 U.S.C. §1738, which provides, in pertinent part:

> "[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Clearly, petitioner could not relitigate Action No. 1 in the New York State courts even if she asserted claims under §§1983 and 1985(3). Weinstein-Korn-Miller, New York Civil Practice, par. 5011.17 at p. 50-103 and cases cited therein. She has already had her day in court, and lost. Accordingly, by reason of the above-quoted statutory provision, this same result must obtain in the federal courts.

Also in point is *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974), *cert. denied*, 419 U.S. 1038 (1974). There, the plaintiff asserted a §1983 claim against his landlord alleging that he was evicted from his mobile home park on account of his protests over the conditions at the park. The plaintiff did not raise his §1983 claim based on his First Amendment rights in the state court action brought successfully by his landlord, but asserted it in the subsequent federal action.

In holding that the plaintiff's §1983 claim was barred by the prior state court judgment, the court, at page 1263, said:

> "Res judicata precludes even 'perfect defenses . . . of which no proof was offered. . . . [A] judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, . . .' Cromwell v. County of Sac, 94 U.S. 351, 352-353, 24 L. Ed. 195 (1877). *In Preiser v. Rodriguez, 411 U.S. 475, 497, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973), the Supreme Court indicated that res judicata would be fully applicable to §1983 actions.*" (Emphasis added.)

Accord: Frazier v. East Baton Rouge Parish School Board, 363 F.2d 861 (5th Cir. 1966).

In dissent in the Court of Appeals below, Judge Oakes, in a footnote (App. II of Petition, p. A32, n.6), indicated that he thought the present action was not barred by the doctrine of *res*

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judicata citing *Herendeen v. Champion Int'l Corp.*, 525 F.2d 130 (2d Cir. 1975). Judge Oakes, however, did not, and did not purport to, give full consideration to this issue in dissent. The *Herendeen* case involved a former employee of a subsidiary of the defendant who quit his job but relied on an alleged oral understanding that he would continue to receive all employment benefits and a written contract from his former employer. He brought suit on the alleged oral understanding in the New York State Court and lost on the ground that enforcement of the oral agreement was barred by the Statute of Frauds and because the oral statements were merely an agreement to agree. In the federal court, the plaintiff then started a new action for his pension rights that he claimed were vested under his former contract of employment. The Court of Appeals held that the judgment in the state action did not bar the federal action because two distinct causes of action were involved based on two distinct contracts.

The instant situation is different. Here if petitioner were to prevail on her claims she would obtain just what the New York Supreme Court said she could not have — the right to cause the Corporation to transfer the stock to her.

As this Court said in *Pittsburgh & West Virginia Railway v. United States*, 281 U.S. 470, 479-80 (1930):

> "The thing presented for adjudication in the case in the state court was the validity of the order and it was incumbent on the appellant to present in support of his asserted right of attack every

available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that.

As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." (Citations omitted.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Martin I. Shelton
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BLEED THROUGH

APPENDIX A — PETITIONER'S COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BARBARA GIRARD,

Plaintiff,

-against-

94th STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants.

75 Civ. 646

Plaintiff, BARBARA GIRARD, by her attorneys, BALLON, STOLL & ITZLER, complaining of defendants, respectfully alleges as follows:

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. §1343 (1), (3), (4) and 28 U.S.C. §1331 (a).

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

Appendix A — Petitioner's Complaint

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

3. Plaintiff resides at 1125 Fifth Avenue, County, City and State of New York.

4. Upon information and belief, defendant, 94TH STREET AND FIFTH AVENUE CORPORATION, is a domestic corporation, duly organized and existing under and pursuant to the laws of the State of New York, and is engaged in business as a cooperative apartment house in the City, County and State of New York.

5. That upon information and belief, the corporate defendant, owns, operates, manages and controls the land and building at premises located at 1125 Fifth Avenue, County, City and State of New York.

6. Upon information and belief, defendants, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY, are residents of the County, City and State of New York, and constitute the officers and the entire Board of Directors of the corporate defendant, and wholly dominate, operate and control all of its business and financial affairs.

7. Prior to the 10th day of January, 1968, and for some time thereafter up to the 16th day of October, 1973, plaintiff was married to STEPHEN S. GIRARD.

8. On or about the 10th day of January, 1968, STEPHEN S. GIRARD purchased 497 shares of capital stock of the corporate defendant, and by reason of said purchase became the owner of the proprietary lease to the 4th floor of the aforesaid premises for the term January 15, 1968 to May 31, 1981. A copy of said lease is annexed hereto and made a part hereof as Exhibit "A".

9. Thereafter, and in accordance with the proprietary lease, and by reason of STEPHEN S. GIRARD'S ownership of the shares of stock of the corporate defendant, the plaintiff, her husband, and the infant child of their marriage, duly entered upon and occupied the 4th floor apartment at 1125 Fifth Avenue, New York, New York.

10. Thereafter, and at diverse times, the corporate defendant accepted maintenance payments from BARBARA GIRARD.

11. On or about the 3rd day of May, 1973, BARBARA GIRARD and her husband entered into a separation agreement pursuant to which, *inter alia,* STEPHEN S. GIRARD duly conveyed and assigned to the plaintiff all of his right, title and interest in and to the aforesaid shares of capital stock and proprietary lease, in lieu of all payments of alimony, gave to the plaintiff sole custody of their infant child and vacated the premises. A copy of said separation agreement is annexed hereto and made a part hereof as Exhibit "B".

12. Thereafter, and on or about the 16th day of October, 1973, a judgment of divorce was entered in New York County, which judgment incorporated the aforesaid separation agreement. A copy of said judgment of divorce is annexed hereto and made a part hereof as Exhibit "C".

13. Upon completion of the aforesaid lease-stock transfer, the corporate defendant was duly notified of same, and plaintiff made demand upon the corporate defendant that it duly recognize plaintiff as the owner of said stock, proprietary lease, and the lawful tenant entitled to peaceful possession thereof; and that defendant record on its books and records, plaintiff's ownership of said shares of stock and proprietary lease.

14. Thereafter, and upon receipt of plaintiff's demand as hereinabove alleged, the defendants conspired with each other and formed a deliberate design in purpose to injure this plaintiff solely for the reason that she is of the female sex, and to deprive her of her civil rights by reason of her sex and of her substantial property rights in the subject premises, and, in particular, the ownership of the aforesaid shares of stock and the proprietary lease in said premises, the purpose, intent and result of which was to enable, permit and allow the said defendants to receive for their own use and benefit and not for the benefit of plaintiff the sole and exclusive right to determine who shall own said shares of stock and the proprietary lease in the subject premises, and the said defendants did the various wrongful and unlawful acts hereinafter alleged, all in furtherance of such unlawful design and purpose.

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15. As a result thereof, the defendants have continually and without cause denied and withheld their consent to the aforesaid lease-stock transfer to plaintiff and have wholly failed and refused, and continue to fail and refuse, to permit her record ownership of said stock, proprietary lease and peaceful possession of the subject premises solely by reason of her sex as hereinabove alleged.

16. In furtherance of the said design and conspiracy as hereinabove alleged, and for the purpose of causing plaintiff to lose her substantial property rights in the subject premises, the said defendants between July 1973 and February, 1975:

(a) Advised, caused, permitted and allowed the President and the Board of Directors of the corporate defendant to deny plaintiff permission and authority to continue occupancy of the subject premises.

(b) Informed plaintiff that the corporate defendant could not and would not accept plaintiff as the true and lawful owner of the aforesaid shares of stock and the proprietary lease in the subject premises even though she had received said property rights by reason of a lawful assignment from STEPHEN S. GIRARD, as hereinabove stated; and specifically refused plaintiff an opportunity to appear and be present at any discussions or meetings of the officers and Board of Directors of the corporate defendant at which she could establish her proprietary interest in said shares of stock and lease, and refused to provide plaintiff with minutes of said meetings or with any statement, written or oral, which would explain the basis of the aforesaid acts.

(c) Failed and refused to accept any checks or other payments tendered by plaintiff or her agents in full payment of the maintenance required for occupancy of said demised premises, although plaintiff duly offered to pay same and has, in fact, tendered to the corporate defendant any and all payments required under the terms of the aforesaid proprietary lease, which payments were previously accepted by the corporate defendant from STEPHEN S. GIRARD and/or plaintiff.

(d) Failed and refused to accept any guarantee by any persons financially able to discharge any indebtedness that may arise to the corporate defendant by reason of plaintiff's continued occupancy of the subject premises as tenant thereof.

(e) Harrassed, annoyed and disturbed plaintiff in her occupancy of the subject premises by commencing legal proceedings for her eviction, and otherwise interfering with her peaceful enjoyment and occupation thereof.

(f) Deliberately and maliciously made telephone calls to plaintiff at unreasonable hours solely for the purpose of harrassing and annoying her in order to force plaintiff to vacate said premises and to withdraw her demand to the corporate defendant to recognize her as the lawful owner of the aforesaid shares of stock and proprietary lease to said premises.

17. The defendants did all of the acts and things hereinabove alleged in pursuance of the aforesaid conspiracy and scheme to cause plaintiff to be deprived of her substantial property rights in the subject premises as hereinabove alleged,

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and all of said acts and things were participated in and done by all of the defendants, or by one or more of them as steps in the said conspiracy.

18. All of the aforesaid acts, statements and conduct of the defendants aforesaid, were committed solely for the purpose of excluding plaintiff from occupancy of the premises or right to ownership of the aforesaid shares of stock in the corporate defendant; and solely for the reason that said plaintiff is of the female sex and for no other cause or reason.

19. By virtue of the acts, statements and conduct of the defendants aforesaid, plaintiff was deprived of her civil rights and substantial property rights in the subject premises.

20. The aforesaid acts, statements and conduct of the defendants constitute violations of plaintiff's statutory and constitutional rights, to wit, 42 U.S.C. §1985 (3), 42 U.S.C. §1983, Amendment 14 of the United States Constitution, and the New York Executive Law §296 (5) (a) (1).

AS AND FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

21. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 20 with the same force and effect as if more fully set forth at length herein.

22. By reason of the foregoing, and, in particular, defendants' wilful and deliberate failure and refusal to give plaintiff an opportunity to be heard with respect to her right to

be recognized and accepted as the lawful owner of the shares of stock and proprietary lease in the subject premises and defendants' arbitrary, capricious and unreasonable failure to so recognize plaintiff as a lawful tenant entitled to peaceful possession and occupancy of said premises as hereinabove alleged, defendants have deprived plaintiff of her constitutional rights of due process of law as provided for by the Constitution of the United States, the Constitution of the State of New York, and applicable federal statutes.

WHEREFORE, plaintiff demands judgment against all defendants, directing that the corporate defendant recognize plaintiff as the lawful owner of the aforesaid shares of stock and proprietary lease in the subject premises, and that the books and records of the corporate defendant adequately and properly reflect her ownership, interest and lawful right to occupation of said premises and that all defendants, their agents, servants and/or employees be enjoined pendente lite and permanently from taking any and all acts constituting a wrongful interference with plaintiff's peaceful enjoyment and possession of said demised premises, and granting to plaintiff such other and further different relief as to the Court may seem just and proper.

DATED: NEW YORK, N.Y.
February 7, 1975

BALLON, STOLL & ITZLER

s/ (illegible)
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1337

BARBARA GUTMACHER GIRARD,

Petitioner,

against

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

POINT VI

Because the Civil Rights Act of 1871 provides federal remedies supplementary to state remedies, Barbara Gutmacher Girard's complaint in the Federal Court is not barred by doctrines of *res judicata* or collateral estoppel.

Barbara Gutmacher Girard did not bring her claims of sexual discrimination in the state courts. She did not have to do so.

Nor did her failure to bring her federal claims in the state courts constitute a waiver. As a matter of law, a waiver of constitutional rights is not to be presumed. As a matter of fact, Barbara Gutmacher Girard did not waive any of her rights. See, *e.g.*, *Herendeen* v. *Champion Int'l Corp.*, 525 F. 2d 130 (2d Cir. 1975); *Lombard* v. *Board of Education*, 502 F. 2d 631 (2d Cir. 1974).

Circuit Judge Oakes, in his dissenting opinion, has this persuasive analysis:

> "Appellees have argued that this suit is barred by the res judicata effect of a prior state court action brought by appellant against these same appellees. In the state court litigation, however, appellant merely contended that the appellees' refusal to assign to her the shares of the corporation owned by her former husband was in breach of the lease agreement and state corporations law. No violation of civil rights was alleged in the state court action, and the state judge, in ruling against appellant's claim, stated only that appellees have the right to refuse to consent to the transfer of a cooperative lease for any reason 'except, of course, those prohibited by the Civil Rights Law.' *Girard* v. *94th Street and Fifth Avenue Corp.*, Civ. No. 15173/73 (Supreme Court, New York County, July 8, 1974) (memorandum opinion). Only the other day, in *Herendeen* v. *Champion International Corp.*, No. 75-7083 (2d Cir. Nov. 10, 1975), slip op. 483, we held under New York law that where a plaintiff in a second suit sets forth 'an independent claim of defendant wrongdoing' the first suit does not bar the second even though the plaintiff 'could have joined' the second suit claim with the first. *Id.* at 489-91. While Mrs. Girard could have joined her civil rights claim in her state court suit she did not do so. She is not barred, therefore, from asserting it now." App. II, at p. 32 n. 6.

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Conclusion

The Court should grant this petition for a writ of certiorari for a number of reasons, not the least of which are that the Second Circuit's decision is inconsistent with this Court's decisions and contrary to the decisions of the Third, Fifth, Sixth and Eighth Circuits.

Respectfully submitted,

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